



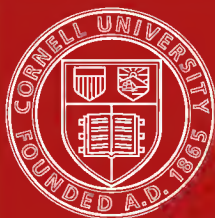
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# THE LAW OF AGENCY



# THE LAW OF AGENCY

BY  
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By

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To  
My Wife,  
Elizabeth Glenn Archer



## PREFACE

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It has long been the custom of law writers, following perhaps the example of the early pioneers of the craft, to write text books for the enlightenment of *practicing lawyers*. Within the past quarter century or so, law writers have included in their hoped-for audience law students as well as lawyers. The result has not been as happy as might be desired, for lawyers nowadays have little use for elementary text books of law—the great digests, encyclopedias, and many-volumed texts having almost completely supplanted the less ambitious work. The real situation is that the great majority of readers of such works are law students. But a book designed primarily for lawyers, and only as an afterthought for students, is not a successful students' book.

A book for beginners should, we believe, be written with the needs of the beginner constantly in mind. It must be simple and concise—as happy in the choice of what to eliminate as what to retain. It must present the fundamental principles clearly and vividly to the reader.

The present volume, like the author's previous work on "Contracts," is an attempt to produce a students' text book that shall meet the needs of the

beginner. The novice at law can never fully appreciate the meaning of an abstract legal principle until he sees how that principle is applied in an actual case. Having observed it in its two-fold aspect—in theory and in practice—it becomes at once a vivid and easy-to-be-remembered working principle of the great science to which he is apprenticed.

In the present volume each statement of law is given in the simplest and clearest language at the author's command, and the statement is followed almost invariably by concrete illustrations from actual cases, often with quotations from the court's opinion to further clarify and emphasize the principle involved.

In the citations the following abbreviations are used: H. for Huffcut's cases on agency; M. for Mechem's cases; R. for Reinhard's cases and W. for Wambaugh's cases on agency.

G. L. A.

Suffolk Law School.

Boston, Jan. 4, 1914.

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# THE LAW OF AGENCY

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**§ 1. Importance of agency in everyday affairs.**  
The law of agency may perhaps be more easily understood if we first consider the causes from which the business relation known as agency has arisen.

It is obvious that a given individual can be in but one locality at a given moment of time. His business activities, in his own person, are therefore limited. If, for example, a contract may be made in the town

of X at ten o'clock on a given day and similar opportunities are open in the towns of W and Y at the same day and hour, it is obvious that the individual who desires to negotiate in person each of these contracts for himself must choose which of them he will undertake, and must let the others go by default.

Confronted by problems of this sort, men have, from the earliest times, resorted to the simple expedient of employing other men to act in their behalf and to transact business affairs for them precisely as if they themselves were present and acting. If these representatives have been properly instructed in their duties and faithfully discharge the same there is no reason why the will of the person who has appointed them may not act in the transaction as if he were in fact present.

The law recognizes and upholds such delegations of the powers of an individual. The idea is aptly expressed in the time honored Latin maxim, "*Qui facit per alium facit per se*," which being interpreted means "he who acts through another acts in person." This maxim is often said to be one of the foundation principles of the law of agency.

But the point to be remembered in this connection is that by means of the legal expedient of appointing others to act in one's behalf much of our present day civilization has directly resulted. No business house could exist without it. Superintendents, foremen, salesmen and clerks are merely the representatives of the proprietor, or proprietors, of the business.

All acts performed by such superintendents, foremen, salesmen and clerks within the limits of their respective authorities are the acts of their employer. The law of agency which governs these transactions is, therefore, of vital importance in everyday affairs.

**§ 2. Agency defined.** Agency in its broadest sense exists whenever one person, with actual or implied authority from another, represents and acts for that other in any transaction wherein the other could have acted for himself.<sup>1</sup>

In a somewhat narrower sense, however, agency

<sup>1</sup> Many definitions of "agency" exist. A few of them are as follows:

"In the common language of life he, who, being competent, and *sui juris*, to do any act for his own benefit, or on his own account, employs another person to do it, is called the principal, constituent, or employer; and he who is then employed is called the agent, attorney, proxy, or delegate of the principal, constituent or employer. The relation, thus created, between the parties, is termed an agency." Story, Agency, § 3.

"Agency is founded upon a contract, either express or implied, by which one of the parties confides to the other the management of some business, to be transacted in his name or on his account, and by which the other assumes to do the business and to render an account of it." 2 Kent, Com. 612.

"Agency is a legal relation, founded upon the express or implied contract of the parties, or created by law, by virtue of which one party—the agent—is employed and authorized to represent and act for the other—the principal—in business dealings with third persons." Michem, Agency, § 1.

"Agency is a term signifying the legal relations established when one man is authorized to represent and act for another and does so represent and act for another." Huffcut, Agency (2nd edition), 5.

"Agency is a contract by which one person, with greater or less discretionary powers, undertakes to represent another in certain business relations." Wharton, Agency, 1.

signifies the relation that exists when one person authorizes another to represent and act for him in business transactions with third parties. It is in this narrower sense that agency is ordinarily understood. The term agent, also, is applied exclusively to those persons who engage for hire or otherwise to transact *business affairs* in behalf of the person or persons who have authorized them to act.

**§ 3. Interrelation of the law of agents and the law of servants.** The term "agent" does not include and cannot well include all persons who undertake for hire to discharge the duties or to perform the tasks that their employer would otherwise be obliged to perform in person. Only those who conduct business affairs for another can rightly be termed "agents," or come within the laws of agency in this limited sense. If, therefore, the same person combines the duties of both agent and servant his acts may be governed by either of two parallel systems of law.

For example:—A is employed by X, a grocer. His duties are to drive about from house to house every forenoon taking orders for groceries from customers of X. His afternoons are devoted to delivering the groceries thus ordered. Now, if during one of his forenoon trips A should through careless driving run down and injure a pedestrian his employer would be liable. The doctrines of agency in its more restricted

sense, as we shall see in a later chapter—expressly provide for such cases.

But suppose A while driving the delivery wagon of an afternoon should run down and injure a pedestrian in the same manner as before. Will the same laws govern the liability of his employer? No; A was not acting as an agent in this latter case, and the laws of agency cannot apply. A was a servant at the time and the law of master and servant must be invoked. But the result is not changed. X's liability is the same, for identical rules of responsibility of the principal for the torts of his representatives exist under both systems of law.

**§ 4. The law of master and servant a legitimate branch of agency.** Such distinctions are obviously artificial. Hence, the broader view of the subject which includes the law of agents and the law of servants as well. It should constantly be borne in mind, therefore, that the law of master and servant will be treated in this volume as a legitimate part of the broad subject which, for lack of a better designation we call "agency."

**§ 5. Principal.** A principal is one who confers authority upon another person to represent and act for him in business transactions with third parties.

**§ 6. Agent.** An agent is a person upon whom the principal confers authority to represent and act for him in business transactions with third parties.

**§ 7. Master.** A person who employs another to perform manual labor, or to render such services as do not involve the making of contracts or entering into other business relations in his behalf is frequently designated as “master.”

The term master, however, is suggestive of the days of chattel slavery and bound apprenticeships, so the more modern tendency is to substitute therefor the terms “employer,” or “principal.”

**§ 8. Servant.** The term “servant” includes all persons in the employment of another who perform manual labor or render such services as do not involve the making of contracts or entering into other business relations in behalf of their employer.

**§ 9. Servant distinguished from agent.** The servant and agent stand forth in sharp contrast in respect to their employment. To the servant the employer delegates tasks that are menial in their nature, such as manual labor; whereas to the agent he intrusts the higher duties of acting in his behalf in business transactions.

For example: A, a lumber dealer, employs B and C under the following circumstances. He instructs B to proceed to a nearby town and there to negotiate in his behalf with certain contractors who are about to erect a large building, and to secure if possible a contract to supply them with the lumber that may be used in the building. B is to have the use of A's

automobile for the trip and C is to accompany him as chauffeur. The distinction between the respective functions of B and C is clearly apparent. B is an agent and C is a servant.<sup>2</sup>

**§ 10. A person may be both servant and agent.** As indicated in another connection<sup>3</sup> the functions of both agent and servant may be combined in the same individual. A person thus empowered may, therefore, act at one time as an agent and at another as a servant. The nature of the act which he performs is of course the determining factor.

Example One: C desires to build a garage on his premises. He engages D, a carpenter, to work for him by the day until the building is finished. Being unfamiliar with the value of lumber he intrusts D to select and order the necessary lumber. D acts accordingly, and after the materials have been delivered, constructs the garage. In ordering the lumber D exercised the functions of an agent, since his act resulted in the creation of a contract between his principal and the lumber dealer. But in all other duties in connection with the work upon the garage D was a mere servant.

<sup>2</sup> "The great and fundamental distinction between a servant and an agent is that the former is principally employed to do an act for the employer, not resulting in a contract between the master and a third person, while the main office of an agent is to make such a contract." Dwight Persons and Pers. Prop. p. 323; *Kingan & Co. v. Silvers*, 13 Ind. App. 80 R. 5.

<sup>3</sup> § 3 (ante).

Example Two: N was a traveling salesman in the employ of the plaintiff. The defendant owed the plaintiff; and, as N was to be in the defendant's neighborhood, the plaintiff authorized him to procure a promissory note in settlement of the defendant's account. N did so, but after the note had been delivered to him to be carried to the plaintiff he wrongfully altered it so as to make it provide for interest from the date of execution, instead of from its time of maturity. It appeared that the plaintiff had never ratified or approved the alteration.

The plaintiff now brings suit on the note as it originally existed. Now, under the law, if the plaintiff had actually or impliedly authorized the alteration it would have rendered the note null and void.<sup>4</sup> The defendant claimed that N was the plaintiff's agent at the time and that his act was the act of the plaintiff.

The court, in the course of a learned and luminous opinion, spoke in part as follows: "At the time Nichols made the alteration of the note, was he the agent or the servant of the plaintiff in respect to his duties pertaining to said note? It is averred that he was a traveling salesman, but that he was not a general agent, and had no authority to make settlements or take notes on plaintiff's accounts; nor was that any part of his duties; that being about to go to Lebanon in the course of his duties as such traveling salesman,

<sup>4</sup> Archer on Contracts, §§ 357-360.

the plaintiff instructed him to procure for plaintiff from the defendants a note on account of an indebtedness due from them to the plaintiff. \* \* \* The same person may be a special agent of the same principal in several different matters. Nichols was the agent of the plaintiff to sell goods. He was also its agent to procure the note. We are here concerned with the latter agency only. \* \* \* When Nichols was engaged in treating with the defendants concerning the note he was an agent. When the note was delivered to him \* \* \* he ceased to be an agent because he was not required to deal further with third parties. He was then a mere servant of the plaintiff charged with the duty of faithfully carrying and delivering the note to his master. \* \* \* No liability arises against the master for the wrongful acts of his servant unless the servant has perpetrated an injury either upon the person or property of another. Nichols was the servant of the plaintiff when he made the alteration of the note. But did he inflict any injury upon the property of the defendant? Certainly not. The injury, if any, was inflicted upon the property of his own master, and not upon the property of the defendants. \* \* \* The principle that a master is liable for the tortious acts of his servants committed in the line of their employment has no application to the facts of this case, for no injury was done the defendant's property." <sup>5</sup>

<sup>5</sup> Kingan & Co. v. Silvers, 13 Ind. App. 80.

**§ 11. Servant distinguished from independent contractor.** Servants should also be distinguished from independent contractors, for we shall see in a later chapter <sup>6</sup> that the liability of an employer for the torts of an independent contractor is very different from his liability for the torts of a servant.

An independent contractor is one who engages to perform a given piece of work for which he is to receive a stated sum, either before or after the completion of the work. In such contracts the person for whom the work is to be performed retains no control over the workmen employed by the contractor and takes no part whatever in directing the work. All that he can require of the contractor is that the work when completed shall satisfy the terms of the contract.

Example One: A owns certain land in the suburbs of a city. He desires to erect a dwelling house on the land. After the specifications for the house are agreed upon, he contracts with B that the latter shall erect the house for an agreed price of \$5,000, and have the same ready for occupancy on or before the 15th of the following September. B is an independent contractor.

Example Two: C owns certain marsh land which he desires to have drained. D offers to drain the marsh for a certain sum, agreeing to dig a sufficient number of trenches to carry off all surplus water. C agrees to the terms of D's offer and the latter per-

<sup>6</sup> Ch. XIV.

forms the work as agreed. D is an independent contractor.

It will, therefore, be observed that the distinction between a servant and an independent contractor is whether or not the employer contracts for a completed task, or merely for service in the performance of the task. If he contracts for the completed task, he retains no control over the methods of its performance and the doer is therefore called an independent contractor. If on the other hand he contracts for service merely, the doer is his servant.

For example: A owns two woodlots which he desires cleared. B contracts to clear the first lot for the sum of fifty dollars. C engages to clear the second lot as a day laborer for a fixed wage of two dollars per day. B is an independent contractor and C a servant.

**§ 12. Classification of agents.** Agents are usually classified according to the nature and extent of their authority into, universal agents, general agents and special agents.

*A universal agent* is one who possesses authority to act for his principal in all the latter's business affairs.

For example: A is a man of wealth and has many business interests that demand constant attention. In consequence of a nervous breakdown he is obliged to take an extended period of rest. Before leaving his home city, he authorizes B by an appointment under

seal to attend to all his business affairs during his absence. B is a universal agent.

*A general agent* is one who is empowered to transact all of the business for his principal of a particular kind or in a particular place.

Example One: A who owns a stock farm, a lumber mill, a tannery and a hotel, appoints B, C, D and E, respectively, as managers of the enterprises. Each of the four is a general agent.

Example Two: W is the proprietor of a grocery business, with branch stores in Boston, Cambridge, and Newton. He appoints H as the manager of the stores in Boston and Cambridge, and J the manager of the store in Newton. H and J are each general agents.

*A special agent* is one who is empowered to act for his principal in one transaction only; or to perform a specific act, or series of specific acts, in accordance with definite and positive instructions.

For example: A gives B authority under seal to act in his behalf in a transfer of land, B to have authority to sign A's name to the deed and to receive payment for the land. B is a special agent.

## CHAPTER II

### CAPACITY OF PARTIES

- § 13. Who may be a principal.
- § 14. The presumption of capacity.
- § 15. The presumption of incapacity.
- § 16. Infants as principals.
- § 17.       Contracts for necessities.
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- § 19. Married women as principals.
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- § 21.       When insanity of principal is unknown.
- § 22. Corporations as principals.
- § 23. Unincorporated clubs as principals.
- § 24. Partnerships as principals.

**§ 13. Who may be a principal.** Any person who has legal capacity to act in his own behalf may ordinarily appoint an agent to act for him. The existence of contractual capacity is the usual test. If a person possesses legal capacity to make a contract in his own behalf he may ordinarily enter into a similar contract through the mediation of an agent. The question then arises, what persons are legally competent to make contracts in their own behalf?

**§ 14. The presumption of capacity.** “Generally speaking, all persons who have arrived at the age of discretion have legal capacity to make contracts.

The law presumes that such persons are fully qualified to enter into contractual relations, for the great majority of people are so qualified and it would seem absurd to require every litigant who comes into court with a contract case to first prove his capacity to make the contract. The simpler way is to allow the presumption to stand until the aggrieved party produces evidence that he or she did not possess actual legal capacity to make the contract in question. In the face of such evidence the presumption of capacity is overthrown and the court will extend its protection to the incompetent party.”<sup>1</sup>

**§ 15. The presumption of incapacity.** “Incapacity to contract can ordinarily proceed from but one cause, namely, a lack of mental capacity. Contracts are always the result of mental effort. The mind of one person meets that of another upon a given proposition through an interchange of ideas and an agreement called a contract is reached. If, therefore, one party has not the mental capacity to safeguard his own rights in a contest of wits, and would readily be overreached by an individual of normal mental equipment, it is right and proper that the law should establish safeguards for such an individual.

“It has done so by means of a series of presumptions. An infant, for instance, is presumed to be incapable of making a binding contract. The same is true of insane persons. Now let an infant or an

<sup>1</sup> Archer on Contracts, § 9.

insane person be sued in court upon a contract, the general presumption that all persons who have arrived at the age of discretion have contractual capacity will at first apply. Unless it is brought to the court's attention that the defendant was an infant or a lunatic the general presumption would stand and the defendant might be held liable. But so soon as the allegation of infancy or lunacy is called to the court's attention then the presumption of incapacity immediately arises and overturns the general presumption. The defendant will ordinarily be excused if he can prove the allegation of incapacity."<sup>2</sup>

Infants, insane or drunken persons were presumed by the common law to be incapable of making binding contracts because of a lack of mental capacity. Married women were also presumed to be incapable of making contracts, but incapacity in this case proceeds from a different cause, as we shall later observe.

**§ 16. Infants as principals.** The term "infant," or "minor," at common law includes all persons, whether male or female, who are under the age of twenty-one years.<sup>3</sup> The contracts of infants do not stand upon the same basis as the contracts of persons of full age.

The contract of an adult is, as we know, irrevoca-

<sup>2</sup> Archer on Contracts, § 10.

<sup>3</sup> "In some jurisdictions it is provided by statute that females attain their majority at eighteen years of age, either for the purpose of contracting marriage without parental consent, or for all purposes whatsoever." Archer on Contracts, § 12.

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ble and binding unless entered into under circumstances which the law recognizes as grounds for setting the contract aside. But the contracts of infants are ordinarily capable of being set aside at the will of the infant, irrespective of the circumstances under which they were created. The law regards infancy itself as a ground for rescission and declares that any person who enters into a contract with an infant, unless for necessities of life, does so at his peril.

The infant's rights are safeguarded by the provision of law that when the infant reaches majority and attains the maturity of mental powers with which he is presumed to become endowed at that age he may review contracts made during minority and ratify or avoid them as seems to him wise and prudent. Infants' contracts are, therefore, said to be *voidable*.

In early times it was laid down as a rule of law that an infant could not appoint an agent.<sup>4</sup> He was, however, allowed to employ servants.<sup>5</sup>

The modern rule seems to be that (except in cases requiring authority under seal) an infant may appoint an agent; but that the contracts of such agents are voidable in the same manner as the contracts of the infant himself.<sup>6</sup>

For example: An action was brought by A to re-

<sup>4</sup> Trueblood v. Trueblood, 8 Ind. 195, 65 Am. Dec. 756, M. 29, R. 340; Armitage v. Widoe, 36 Mich. 124.

<sup>5</sup> Chapple v. Cooper, 3 M. & W. 252.

<sup>6</sup> Hastings v. Dollarhide, 24 Cal. 195; Whitney v. Dutch, 14 Mass. 457, R. 18; Hardy v. Waters, 38 Me. 450; Towle v. Dresser, 73 Me. 252;

cover \$75 alleged to be due him from B. It appeared that A had sold a certain patent right to B's son, who was a minor, but B had acted as agent in his son's behalf and the agreement to purchase had been signed in the name of the infant principal "per B." The amount claimed was the balance due under this contract, and A seeks to hold B on the ground that no contract was ever made with the minor because of the latter's inability to act through an agent. The court held that the plaintiff could not recover.

"This alleged breach of an implied warranty," said the court, "is founded on the assumption that the son could not confer any authority during his minority to his father to act for him in the purchase of this patent right. \* \* \* The act of an infant in making such a contract as this, which may be for his benefit in transacting business, either directly or through the agency of another, is voidable only, and not absolutely void, and therefore there is no breach of the implied warranty, unless there be proof showing that the act of the agent was entirely without the infant's knowledge or consent. The mere fact of the infancy of the principal will not constitute such breach."<sup>7</sup>

**§ 17. Infants as principals—Contracts for necessities.** The origin of the rule as to voidability of

Patterson v. Lippincott, 47 N. J. L. 457, M. 507, R. 412, W. 514, H. 535;  
Askey v. Williams, 74 Tex. 294, 11 S. W. Rep. 1101, 44 L. R. A. 167.

<sup>7</sup> Patterson v. Lippincott (supra).

an infant's contract is, as we have seen, the desire of the law to protect the infant from the results of improvident contracts. If he contracts for luxuries, either personally or through an agent, the contract may be ratified or avoided upon the infant's attaining majority. Tradesmen, therefore, act at their peril in making such contracts with infants.

But let us suppose the same rule applied to infants' contracts for necessities of life. It is easy to see that infants would find it exceedingly difficult to induce tradesmen or others to furnish them with even the things essential to life itself if such contracts could be afterward avoided. The law aims to protect minors and it has, therefore, wisely decreed that an infant cannot escape liability for necessities, thus reassuring those who might otherwise decline to deal with them. Such liability, however, is limited to the fair value of the necessities.<sup>8</sup>

Contracts for necessities, if made by the agent of an infant, stand upon precisely the same basis as those made by the infant himself. The principal is liable for the fair value of the necessities.

**§ 18. Infants as principals—Powers of attorney.** Although infants may appoint agents to execute simple contracts in their behalf yet, by the general rule, infants cannot give a valid power of attorney, that is, authority by an instrument under seal.<sup>9</sup>

<sup>8</sup> For an explanation of what is meant by the term "necessaries" see Archer on Contracts, §§ 22, 23.

<sup>9</sup> Lawrence v. McArter, 10 Ohio 37, W. 18; Philpot v. Bingham, 55

As will be seen later, an agent who is appointed to execute a contract under seal must have authority under seal. It follows, therefore, that an infant cannot authorize an agent to execute such a contract; and if he attempts to do so the act of the agent is void. The question most frequently arises in cases involving the sale of real estate.

For example: W, an infant, owned a certain parcel of land. R, the father of W, assuming to act as his agent, sold and conveyed the land to the plaintiff. After W became of age he is alleged to have ratified the transaction, but later repudiated it and sold and conveyed the land to L. The plaintiff brings this action to set aside the conveyance to L and to compel W to execute to him a proper deed. The court held that the original conveyance was void and hence could not be ratified.<sup>10</sup>

**§ 19. Married women as principals.** Although at common law spinsters and widows possessed the same capacity to make contracts as did men, yet all contractual rights were denied to married women. Hence, during coverture,<sup>11</sup> a wife could not enter into contractual relations either personally or through the mediation of an agent.<sup>12</sup>

Ala. 435; *Trueblood v. Trueblood*, 8 Ind. 195, 65 Am. Dec. 756, M. 29; *Waples v. Hastings*, 3 Han. (Del.) 403, W. 20.

<sup>10</sup> *Trueblood v. Trueblood* (supra).

<sup>11</sup> For a more complete exposition of this topic see Archer on Contracts, §§ 29-32.

<sup>12</sup> *Oulds v. Sansom*, 3 Taunt 261; *Brittin v. Wilder*, 6 Hill (N. Y.) 242; *Caldwell v. Walters*, 18 Pa. 79, 55 Am. Dec. 592.

Modern statutes, however, have removed many of the common law disabilities of married women. In any jurisdiction where married women are empowered by statute to make contracts (and this is true almost universally at the present time) she also has power to appoint agents to act in her behalf.<sup>13</sup>

This power of married women to make contracts, however, like all rights created by statute, is subject to interpretation by the courts. If a married woman appoints an agent the acts of such agent in her behalf are binding upon her only within the limits of the capacity conferred upon her by statute.

It does not follow by necessary conclusion that because a power to act in person has been conferred by statute this power can be exercised through an agent. The provisions of the enabling statute must be considered. The courts in some jurisdictions construe these statutes most strictly.<sup>14</sup>

For example: The statutes in a certain state empowered married women to convey lands by deed if the husband joined in the conveyance and the woman

<sup>13</sup> *Weisbrod v. Railway Co.*, 18 Wis. 35, 86 Am. Dec. 743, M. 31, W. 28; *Lavassar v. Washburne*, 50 Wis. 200, 6 N. W. Rep. 516; *McLaren v. Hall*, 26 Iowa 297; *Patten v. Patten*, 75 Ill. 446; *Vail v. Meyer*, 71 Ind. 159, H. 30; *Griffin v. Randdell*, 71 Ind. 440; *Porter v. Haley*, 55 Miss. 66, 30 Am. Rep. 502, R. 23; *Knapp v. Smith*, 27 N. Y. 277; *Baum v. Mullen*, 47 N. Y. 577; *Maxey Mfg. Co. v. Burnham*, 89 Me. 538, 36 Atl. 1003; *Bodine v. Kileen*, 53 N. Y. 93, W. 30.

<sup>14</sup> *Mott v. Smith*, 16 Cal. 533, R. 21; *Holland v. Moon*, 39 Ark. 120; *Sumner v. Conant*, 10 Vt. 9; *Kenton Ins. Co. v. McClellan*, 43 Mich. 564, R. 22.

herself upon separate examination acknowledged the instrument to be her free act and deed. B, a married woman, desired to convey land under the provisions of this statute. She, together with her husband, executed a power of attorney to C, duly acknowledged and certified, authorizing him to make the conveyance. The court held that a conveyance executed by C was invalid because the statute did not contemplate the exercise of the power through an agent.<sup>15</sup>

**§ 20. Insane persons as principals.** Although formerly the contracts of insane persons were deemed void, yet the rule now generally prevailing is that the contracts of insane persons are voidable, much the same as the contracts of infants. The contracts of *agents* of insane principals are generally declared void.<sup>16</sup>

For example: An action of ejectment was brought against the defendant to recover a certain lot of land in the city of San Francisco. The defendant set up in defense that the land had been duly conveyed to him by R, who had acted under a power of attorney from the plaintiff's father. The plaintiff proved that at the time of the execution of the power of attorney the father was of unsound mind. The question arose whether a conveyance by the

<sup>15</sup> Sumner v. Conant (*supra*).

<sup>16</sup> Dexter v. Hall, 15 Wall. (U. S.) 9, 21 L. Ed. 73, R. 27, H. 20; Marvin v. Inglis, 39 How. Prac. (N. Y.) 329; McClun v. McClun, 176 Ill. 376, 52 N. E. 928.

agent of an insane person was valid. The court held that the conveyance in question was void.

“Looking at the subject in the light of reason,” said the court, “it is difficult to perceive how one incapable of understanding and of acting in the ordinary affairs of life can make an instrument, the efficacy of which consists in the fact that it expresses his intention, or more properly his mental conclusions. The fundamental idea of a contract is that it requires the assent of two minds. But a lunatic, or person *non compos mentis*, has nothing which the law recognizes as a mind, and it would seem, therefore, upon principle, that he cannot make a contract which may have any efficacy as such. He is not amenable to the criminal laws, because he is incapable of discriminating between that which is right and that which is wrong. The government does not hold him responsible for acts injurious to itself. Why, then, should one who has obtained from him that which purports to be a contract be permitted to hold him bound by its provisions, even until he may choose to avoid it? \* \* \* While he continues insane he cannot avoid it; if, therefore, it is operative until avoided, the law affords a lunatic no protection against himself. Yet a lunatic, equally with an infant, is confessedly under the protection of courts of law as well as courts of equity. \* \* \* It must, therefore, be concluded that the circuit court was not in error in instructing the jury that a power of attorney executed by an

insane person, or one of unsound mind, is absolutely void.”<sup>17</sup>

**§ 21. When insanity of principal is unknown.** It is held in some jurisdictions that if a person contracts with the agent of an insane principal without actual or implied knowledge of the insanity, and takes no advantage of the insanity, the contract is valid and binding.<sup>18</sup>

For example: An action was brought against the defendant for goods furnished to the defendant's wife. It was set up in defense that at the time of the alleged contract the defendant was insane. It appeared from the facts that the defendant while sane had given his wife absolute authority to act for him and had so informed the plaintiff. Afterward the defendant became insane and, during the period of his insanity, the wife secured the goods in question from the plaintiff, who was unaware of the defendant's insanity. The defendant subsequently recovered his reason and now defends this action. The court held for the plaintiff. “As between the defendant and his wife,” said the court, “the agency expired upon his becoming to her knowledge insane; but it seems to me that the person dealing with the

<sup>17</sup> *Dexter v. Hall* (supra).

<sup>18</sup> *Drew v. Nunn*, L. R. 4 Q. B. D. 661, H. 22; *Matthiessen v. McMahon*, 38 N. J. L. 536; *Davis v. Lane*, 10 N. H. 156; *Merritt v. Merritt*, 43 N. Y. App. Div. 68, H. 25. This principle would probably not prevail in such jurisdictions as hold that contracts of an insane person are voidable notwithstanding the good faith of the other party. Such decisions exist in Massachusetts, Maine and Michigan—for citations see *Archer on Contracts*, § 39.

agent without knowledge of the principal's insanity has a right to enter into a contract with him, and the principal, although a lunatic, is bound so that he cannot repudiate the contract assumed to be made in his behalf. \* \* \* In this case the wife was held out as agent, and the plaintiff acted upon the defendant's representations as to her authority without notice that it had been withdrawn. \* \* \* The defendant became insane and was unable to withdraw the authority which he had conferred upon his wife; he may be an innocent sufferer by her conduct, but the plaintiff, who dealt with her *bona fide*, is also innocent, and where one of two persons, both innocent, must suffer by the wrongful act of a third person, that person making the representation which as between the two was the original cause of the mischief, must be the sufferer and must bear the loss. Here it does not lie in the defendant's mouth to say that the plaintiff shall be the sufferer." <sup>19</sup>

**§ 22. Corporations as principals.** A corporation possesses such powers to enter into business relations as its charter expressly or impliedly confers. It has authority to make contracts, either by the official action of the corporation or through agents. Although the charter usually confers express power to appoint agents, yet if no provision is made in the charter the power to appoint is nevertheless implied. <sup>20</sup>

<sup>19</sup> *Drew v. Nunn* (supra).

<sup>20</sup> *Hurlbut v. Marshall*, 62 Wis. 590, 22 N. W. 852; *Washburn v. Nashville, etc., R. R. Co.*, 3 Head. (Tenn.) 638; *Protection Life Ins.*

§ 23. **Unincorporated clubs as principals.** An unincorporated association, society or club, such as a church, a social or a political organization, has no capacity to appoint an agent. If an agent is appointed to act for such association, society, or club no financial obligation is incurred by *members* of the club *unless they have expressly or impliedly authorized him to act*. Mere membership in the club does not render members liable personally for contracts made by agents, officers or committees.<sup>21</sup>

For example: An action was brought against the members of a certain Masonic lodge, to hold them liable upon a certificate of indebtedness, executed by the master and wardens, for a debt incurred in the erection of a lodge building. The lodge was an unincorporated body, formed for "charitable, benevolent and social" purposes. The lower court ruled that all the members were liable and judgment was accordingly entered for the plaintiff. On appeal the judgment was reversed.

"Here was no evidence," said the court, "to warrant an inference that when a person joined the lodge he bound himself as a partner in the business of purchasing real estate and erecting buildings, or as a partner so that other members could borrow money on his credit. \* \* \* But those who engaged in

Co. v. Foote, 79 Ill. 361; St. Andrew's Bay Land Co. v. Mitchell, 4 Fla. 192, 54 Am. Dec. 340.

<sup>21</sup> Ash v. Guie, 97 Penn. St. 493, 39 Am. Rep. 818, M. 45; Davison v. Holden, 55 Conn. 103, 3 Am. St. Rep. 40, M. 47; Lewis v. Tilton, 64 Iowa 220, 52 Am. Rep. 436, M. 510.

the enterprise are liable for the debts they contracted, and all are included in such liability who assented to the undertaking or subsequently ratified it. Those who participated in the erection of the building by voting for and advising it are bound the same as the committee who had it in charge. And so with reference to borrowing money. A member who subsequently approved the erection or borrowing could be held on the ground of ratification of the acts.”<sup>22</sup>

§ 24. **Partnerships as principals.** A partnership differs from the ordinary unincorporated association in respect to the purposes for which it is created. The object of a partnership is to engage in business enterprises for the purpose of profit. The law places upon each member of such partnership personal responsibility for the contracts, or acts of each of the other partners with reference to the partnership affairs. Each partner is, therefore, regarded not only as a joint principal but also as the agent of each of the other partners. He is not, strictly speaking, an agent of the partnership; for a partnership has no separate existence apart from the members who compose it. The agency of each partner also includes the power to appoint agents to carry out the purposes for which the partnership was created.<sup>23</sup>

<sup>22</sup> *Ash v. Guie* (supra).

<sup>23</sup> *Durgin v. Somers*, 117 Mass. 55; *Harvey v. McAdams*, 32 Mich. 472; *Frye v. Saunders*, 1 Kan. 26, 30 Am. Rep. 421; *Charles v. Eshleman*, 5 Colo. 107.

For example: J and W were members of a partnership engaged in a mercantile enterprise. J authorized F by an instrument under seal<sup>24</sup> to make and indorse negotiable paper for the firm. Suit was brought upon notes executed by F and a judgment was rendered against the partners. W brought a bill in equity for relief against the judgment and one of the alleged grounds of relief was that the notes upon which the judgment was based were executed without W's authority. The court held that W could not escape liability. Said the court: "The only material question is, did those agents act with his consent, or by the authority of the firm? If one partner had power to constitute an agent in any form to do these acts, what injury can result, or how can it be material that the authority was given with unnecessary solemnity? The acts done by the agents are in the same form, and have but the same legal effect, as if the authority had been given in any other way. It is usual and necessary that partners in merchandise should have agents or clerks, with authority to represent them generally. The act of signing notes and giving indorsements in the partnership transactions is a power falling within the usual scope of mercantile dealings; each partner can buy and sell partnership effects, and make contracts in reference to the business of the firm, and pay and receive, and draw and indorse and accept bills and

<sup>24</sup> Authority under seal for the purposes named was as we shall see unnecessary. A simple writing would have been sufficient.

notes. *Jarard v. Basse*, 1 Dallas R. 119; 3 Kent's Com. 17 and references there given. Hence, I am of the opinion that the appointment of Foot, and his acts, as attorney, in signing and indorsing the notes are valid and tantamount to an appointment by both members of the firm; and that so much as the power as gave it the character of a deed was unnecessary and irregular and ought to be treated as surplusage which does not vitiate." <sup>25</sup>

<sup>25</sup> *Lucas v. Bank of Darien*, 2 Stewart (Ala.) 280, M. 27.

## CHAPTER III

### CAPACITY OF PARTIES—Continued

- § 25. Who may be an agent.
- § 26. Infants as agents.
- § 27. Nature of infants authority.
- § 28. Immunities of infant agent.
- § 29. Married women as agents.
- § 30. As agent for her husband.
- § 31. Implied authority to contract for necessities.
- § 32. Corporations as agents.
- § 33. Partnerships as agents.
- § 34. Incapacity arising from adverse interest.
- § 35. Agent may act if both parties assent.
- § 36. Joint agents.
- § 37. Waiver of conditions as to performance by.
- § 38. Public service by.
- § 39. Joint and several agents.
- § 40. Sub agents.
- § 41. Who may be a servant.

**§ 25. Who may be an agent.** Agency, as we have seen,<sup>1</sup> exists whenever one person, with actual or implied authority from another, represents and acts for that other in any transaction wherein that other could have acted for himself. Having considered the capacity of the principal, the question now arises as to the capacity of the agent.

It is obvious that any person who is legally competent to transact business affairs in his own behalf

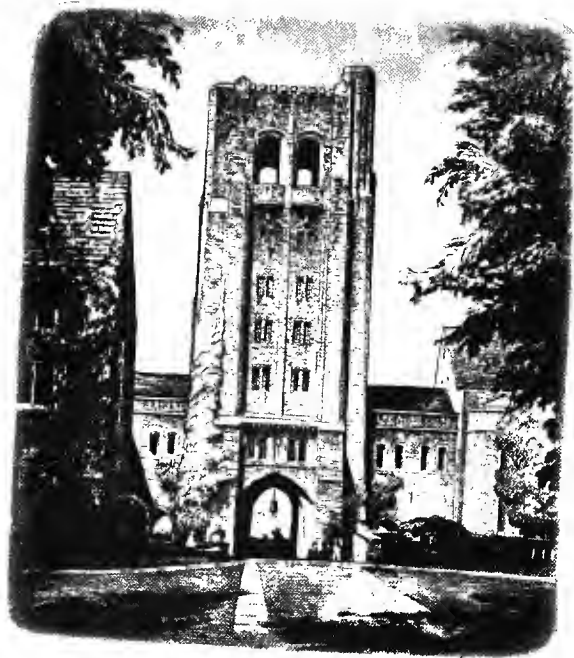
<sup>1</sup> See § 2.

may act as agent for another. But the office of an agent is ordinarily to carry out the orders of his principal. The capacity of one who obeys orders of another need not, necessarily, be as great as the capacity of the person who outlines his duties for him. If he has sufficient capacity intelligently to carry out his orders, this should satisfy all requirements. It is therefore a well settled rule of agency that any person may act as agent for another unless too young, or too weak in intellect to be able to perform the act in question.

The nature of the act to be performed has of course great bearing upon the capacity necessary in the agent who is to perform the act. But this is usually a question for the principal to decide; and if he has negligently selected an incompetent agent to perform a certain act he cannot shield himself from responsibility by setting up the incapacity of the agent.

Persons who are under a legal disability, although ordinarily capable of acting as agents, do not stand upon the same footing as agents of full capacity. To consider them in their order:

**§ 26. Infants as agents.** Any person under twenty-one years of age who is physically and mentally capable of performing the act called for by the agency may act as the agent of another. Although the contracts of an infant when acting in his own behalf are voidable, yet a contract entered into in his



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principal's behalf by an infant agent is ordinarily as binding upon his principal and the other party to the contract as though the agent were of full age.

Example One: F contracted with the minor son of T for the purchase of land belonging to T. When the time came for actual transfer of the land T refused to convey and F brought a bill in equity for specific performance of the contract of sale. T defended on the ground that the son, being a minor, could not make a binding contract in his behalf for the sale of the land. The court held for the plaintiff.

"If authorized," said the court, "according to the settled doctrine of the law, his being an infant can afford no objection against the liability of Talbot; for although the contracts of infants are not in all cases binding upon them, there is no doubt but, as they may act as agents, their contracts made in that character, if otherwise unexceptionable, will be binding upon their principal."<sup>2</sup>

Example Two: Action was brought against the defendant upon a written guarantee by which the defendant had guaranteed the payment for 10,000 bricks, to be supplied to H. It appeared that the guarantee had been executed by a son of the defendant, a boy 16 years of age. It was proved that the son had signed for the defendant on several previous occasions and that he had also accepted negotiable paper in his father's behalf. The court held that the father was liable.<sup>3</sup>

<sup>2</sup> Talbot v. Bowen, 1 A. K. Marsh (Ky.) 436, R. 42, H. 40.

<sup>3</sup> Watkins v. Vince, 2 Starkie 368, W. 7.

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**§ 27. Nature of infant's authority.** Whether acting in behalf of his parents or of strangers, the infant's authority must be clearly established in order to bind the principal. The mere relation of parent and child does not create an implied authorization of the infant to act with reference to property or business interests of the parent, except with reference to necessities which the parent is bound to supply to the infant.

Example One: Action was brought against the defendant for taking and carrying away a yoke belonging to the plaintiff. The defendant alleged in defense, among other things, that the plaintiff's minor son had given him permission to use the yoke. The court held that the son had no implied authority to lend the yoke. "A son," said the court, "has no authority as such to lend his father's property, and there is no presumption that such authority has been given to a son. It may be shown that authority to lend tools and the like has been given to a son expressly, or such an authority may be inferred from the conduct of the father, tending to show that he reposed such confidence and intrusted such discretion to the son, as by showing that on other occasions the son had lent the father's property of a similar kind, and the father, upon the facts coming to his knowledge, approved what he had done; but without such proof the son stands in the same position as a stranger."<sup>4</sup>

<sup>4</sup> Johnson v. Stone, 40 N. H. 197, 77 Am. Dec. 706, M. 78.

Example Two: The plaintiff's son had driven his horses and carriage into town to bring home the plaintiff's daughter. The son hitched the horses in front of the house where his sister was and left them there while he went to attend to some other matters. While he was gone, plaintiff's daughter, who was about 19 years of age, requested the defendant, a friend of hers, to drive herself and a lady friend to a church. The defendant assented, and, while driving, the horses became frightened, ran away, threw out the occupants of the carriage, demolished the carriage and killed themselves. The plaintiff brought an action against the defendant to recover for the loss. The court held that the defendant was not liable. Said the court: "The relation of parent and child, existing between the plaintiff and Leodora Bennett, conferred upon her the right to use, in a careful and proper manner, such property of her father as was customarily applicable to family purposes; as, for instance, the furniture of his house, and we think, the family carriage and horses, subject, of course, to those regulations which parental wisdom should dictate, and parental authority enforce. \* \* \* The law of the land imposes the obligation upon the parent to furnish the child with the necessities of life; and the law of nature prompts him to supply those comforts and luxuries compatible with his social position, which will refine and elevate his mind, and improve and develop his body, and fit him to assume the responsibilities and duties

of the citizen. \* \* \* In this case we cannot see how there was any impropriety in the daughter of the plaintiff using the carriage. \* \* \* We do not think the defendant can be said to have taken the property at all, or to have had it under his control, or in his custody, or possession, but he was simply a passenger at the invitation of the plaintiff's daughter, who had competent and adequate authority, by virtue of her relation to the plaintiff, to use the carriage and horses for the purpose to which they were being applied." <sup>5</sup>

**§ 28. Immunities of infant agent.** It should be borne in mind that an infant when acting as agent may as readily be allowed to set up the defense of infancy whenever such defense becomes needful as if he were not an agent at all. If an infant is working under a contract of employment, he may leave his principal at will and the principal has no rights against him for breach of contract, because, being an infant, he has a right to avoid at any time he chooses. <sup>6</sup>

For example: The plaintiff, who was a minor, made a contract with the defendant to work for him for

<sup>5</sup> *Bennett v. Gillette*, 3 Minn. 423, 73 Am. Dec. 774, M. 79; *Hall v. Harper*, 17 Ill. 82; *Swartwout v. Evans*, 37 Ill. 442; *Paul v. Hummell*, 43 Mo. 122; *Sequin v. Peterson*, 45 Vt. 225, 12 Am. Rep. 194; *Burnham v. Holt*, 14 N. H. 367.

<sup>6</sup> *Widrig v. Taggart*, 51 Mich. 103, W. 7; *Derocher v. Continental Mills*, 58 Me. 217, 4 Am. Rep. 286; *Whitmarsh v. Hall*, 3 Denio (N. Y.) 376; *Vent v. Osgood*, 19 Pick. (Mass.) 572; *Gaffney v. Hayden*, 110 Mass. 137, 14 Am. Rep. 580.

seven months as a farm laborer. (It will be observed that the plaintiff was a servant under the terms of his contract, but the principle of law is the same in this case whether the plaintiff was an agent or servant.) When the plaintiff had been in the defendant's employ under the contract for about three months, he suddenly left the defendant. He now sues the defendant for the wages alleged to have been due at the time of leaving. The defendant endeavored to set up in defense the damage occasioned by the plaintiff's breach of his contract. The court held that he could not do so, and allowed the plaintiff to recover the fair value of his services.

"Persons who contract with minors," said the court, "must understand that they do so at the risk of greater or less disadvantage. The adult binds himself, but the infant does not. And the law has not found it possible to maintain these conditions of inequality, and at the same time secure to the adult the same measure of remedial right which obtains where both parties are of full legal capacity."<sup>7</sup>

**§ 29. Married women as agents.** Although at common law married women were denied the right to enter into contractual relations, yet it was well established even before the rights of married women were enlarged by statute, that a married woman could act as the agent of others.<sup>8</sup> Her rights and immuni-

<sup>7</sup> Wildrig v. Taggart (supra).

<sup>8</sup> Prestwick v. Marshall, 7 Bing. 565; Mackinley v. McGregor, 3

ties as a *feme covert*, however, remained the same as before she undertook to act as agent, and she could incur no personal liability upon contracts executed by her as agent.

**§ 30. As agent for her husband.** A husband could not make a binding contract with his wife at common law, yet from early times the courts have held that a wife could act as an agent for her husband. But except in case of the purchase of necessities the wife cannot act as agent unless authority is expressly or impliedly conferred upon her by her husband. In other words, the wife derives no general authority to act as agent of her husband merely because she is his wife.<sup>9</sup>

Example One: A's wife purchased on credit a pair of diamond earrings from the plaintiff. A refused to pay for them and suit was brought. The court held that since the earrings could not under the circumstances be considered necessities of life the husband was not liable, because he had not authorized her to make the purchase.

"The only ground," said the court, "upon which the defendant could be held liable was by proof that he expressly or impliedly authorized his wife to pur-

Whart. (Pa.) 369, 31 Am. Dec. 522; Hopkins v. Mollinieux, 4 Wend. (N. Y.) 465; Edgerton v. Thomas, 9 N. Y. 40; Pickering v. Pickering, 6 N. H. 124; Felker v. Emerson, 16 Vt. 653, 42 Am. Dec. 532.

<sup>9</sup> Cox v. Hoffman, 4 Dev. & Bat. (N. C.) 180, M. 39; Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384, M. 72; Bergh v. Warner, 47 Minn. 250, H. 147; Butler v. Price, 110 Mass. 97; Whitworth v. Hart, 22 Ala. 343; Emerson v. Blonden, 1 Esp. 142, W. 9.

chase the articles on his credit. This is purely and simply a question of agency, which rests upon the same considerations which control the creation and existence of the relation of principal and agent between other persons.”<sup>10</sup>

Example Two: The defendant's wife, during his absence, borrowed a mule of the plaintiff to be used on the defendant's farm. While in the defendant's service the mule was so badly injured that it died. When the defendant returned home and learned of the injury he told his wife that “he was sorry and that she had done wrong.” It was proven at the trial that the defendant's wife had previously, with his approval, borrowed horses of the plaintiff, and that she was in the habit of borrowing from another neighbor with the husband's approbation. The court held that the defendant was liable because his wife was his agent, acting under due authority.<sup>11</sup>

**§ 31. Implied authority to contract for necessities.** As a general rule, a husband is liable for necessities of life furnished to his wife during coverture. If he neglects properly to supply her, she may purchase them on credit, even against his consent.

For example: The defendant's wife was living apart from him because of his cruelty. He had made no provisions for her support. At the request of defendant's wife the plaintiff supplied her with

<sup>10</sup> *Bergh v. Warner* (supra).

<sup>11</sup> *Cox v. Hoffman* (supra).

milk. He now brings action against the defendant for the value of the milk so furnished. The court held that he could recover, on the ground that the wife had implied authority to pledge her husband's credit for necessities of life.<sup>12</sup>

**§ 32. Corporations as agents.** It is well settled that corporations may act as agents for individuals, partnerships or other corporations.<sup>13</sup> In fact, corporations are frequently chosen as agents in preference to individuals. A corporation is ordinarily created to exist perpetually and is not, therefore, subject to uncertainties of life. Trust companies (corporations formed for the express purpose of caring for estates and trust funds), are growing more and more common at the present day. Acting in such a capacity, the corporation is essentially an agent.

**§ 33. Partnerships as agents.** A partnership may be organized for the express purpose of acting as agents, such as a firm of brokers or of lawyers; or it may be that the scope of the partnership powers merely include the duties of agency. In all such cases the power of course rests with the individuals who compose the partnership, since the firm as such has no separate existence. Any member of the partnership is, therefore, ordinarily eligible to perform the act called for by the agency.<sup>14</sup>

<sup>12</sup> *Benjamin v. Dockham*, 134 Mass. 418, M. 71.

<sup>13</sup> *Killingsworth v. Trust Co.*, 18 Ore. 351, 17 Am. St. Rep. 737, M. 40, R. 46; *McWilliams v. Detroit Mills*, 31 Mich. 275.

<sup>14</sup> *Deakin v. Underwood*, 37 Minn. 98, 5 Am. St. Rep. 827, M. 68.

§ 34. **Incapacity arising from adverse interest.** The agent owes his principal the duty of absolute loyalty to the principal's interests. In negotiating a contract in his principal's behalf, it is his duty to secure terms as advantageous as is honorably possible. If, therefore, he is to derive any personal gain from the other party as an inducement to enter into the contract he is unfaithful to his trust, for it is presumed that when it becomes an object to lead his principal into a particular contract he will sacrifice the latter's interests to bring about the contract. The other party would not offer an inducement to the agent unless he expected thereby to secure an unjust advantage over his principal. Contracts entered into under such circumstances may be avoided by the principal upon discovering the facts if he acts promptly.<sup>15</sup>

The same rule applies to contracts of sale or purchase if the agent is directly or indirectly interested in the other side of the transaction. So also, if the agent acts for both parties without either party knowing that he is also representing the other, for a man cannot serve two masters without sacrificing the interests of one for that of the other.

It is not necessary to show that such adverse interest has actually influenced the agent's contract. It is sufficient to show merely such facts as would

<sup>15</sup> *New York Central Ins. Co. v. Nat. Ins. Co.*, 14 N. Y. 85; *United States Rolling Stock Co. v. Atlantic R. Co.*, 34 Ohio St. 450, 32 Am. Rep. 380; *Davis v. Hamlin*, 108 Ill. 39, 48 Am. Rep. 541, M. 461, W. 917.

have a natural tendency to influence the agent's conduct.

Upon discovering the facts, the party for whom the agent has acted may refuse to pay him his commission,<sup>16</sup> or recover it if it has been paid over.<sup>17</sup>

**§ 35. Agent may act if both parties assent.** But an agent may act for both parties if they are actually or impliedly aware of his dual relation, and may collect compensation from each in accordance with the terms of any agreement that may have existed between them. He may also act for both parties in cases where his duties are not discretionary, or where they consist merely in bringing the parties together to conclude terms for themselves.

For example: The defendant promised the plaintiff that if he found a purchaser for the lands at \$90,000 they would pay him for his services. The plaintiff at that time was representing a prospective purchaser, to whom he subsequently introduced defendant, and who purchased the lands of the defendant at \$90,000. The purchaser paid the plaintiff \$500 as compensation for his services. The defendant paid him \$250 and he brought action to recover additional compensation. The lower court gave him a verdict for \$250 and the defendant appeals. The supreme court held for the plaintiff. "Nothing was

<sup>16</sup> *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459, M. 12, H. 239, R. 57.

<sup>17</sup> *Connell v. Smith*, 142 Penn. St. 25, H. 237.

left to his discretion," said the court. "He had nothing to do with the price. He had simply to find a purchaser willing to give the price asked; and it can be of no importance whatever to the defendants whether or not those purchasers also paid the plaintiff for any services he may have rendered them. As was said in *Ranney v. Donovan*, 78 Mich. 318: 'A broker who simply brings the parties together, and has no hand in the negotiations between them, they making their own bargain without his aid or interference, can legally receive compensation from both of them, although each was ignorant of his employment of the other.' " <sup>18</sup>

**§ 36. Joint agents.** If a principal appoints two or more persons to act as his agents in a given transaction the law presumes, in the absence of a stipulation to the contrary, that he intends the agents to act jointly in carrying out the purposes of the agency. All must agree upon the contemplated action, otherwise the validity of the action may successfully be questioned.<sup>19</sup>

For example: D was indebted to L & Co. For the purpose of securing further credit he deposited with them various securities to cover advances that might

<sup>18</sup> *Montross v. Eddy*, 94 Mich. 100, H. 242; *Gracie v. Stevens*, 56 N. Y. App. Div. 203, H. 243; *Cox v. Haun*, 127 Ind. 325, R. 60.

<sup>19</sup> *Salisbury v. Brisbane*, 61 N. Y. 617; *Rollins v. Phelps*, 5 Minn. 463; *Copeland v. Insurance Co.*, 6 Pick. (Mass.) 198, R. 751; *North Carolina R. R. Co. v. Swepson*, 71 N. C. 350; *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180.

be made to him during the current year, but nothing was done with reference to the past indebtedness. D executed a joint power of attorney to C, S and F to act for him in adjusting the matter. D died and his executors claimed the securities which he had deposited with L & Co. L & Co. brought action against the executors and proved that F, one of the joint agents, had agreed with them that the securities should also apply to the back indebtedness. The question arose whether F could so act as to bind the estate of his principal. The court held that he could not. "Such a power," said the court, "conferred upon several cannot be exercised by one alone, at least in the case of private agencies. It is required that all must act together jointly in the execution of such an agency. \* \* \* Nor could such a trust be delegated by one of such agents to another. The principal is supposed to rely upon the personal integrity and ability of each of his selected agents, these qualifications constituting the reason of the trust. Hence, the maxim applies, *Delegatus non delegare potest.*"<sup>20</sup>

**§ 37. Joint agents—Waiver of condition as to performance by.** Circumstances may exist, however, sufficient to warrant the court in assuming that the principal has waived the implied condition that the power shall be exercised only jointly. In such a case, less than the entire number may act and the princi-

<sup>20</sup> Loeb & Bro. v. Drakeford, 75 Ala. 464, H. 42.

pal will not be allowed to set up the defense of a defective execution of the power.

For example: The defendants, who were partners of a cheese factory, appointed B, M and K a committee to make contracts for the sale of their cheese for the year of 1868. B was not interested in the manufacture of cheese and took little part in the sales. The others acted without consulting him and made many sales, the proceeds of which were distributed among the defendants. In July the plaintiffs bought a quantity of cheese of M and K without the concurrence or participation of B. In November they made a contract for the purchase of a large quantity. B was not consulted. The contract not having been performed, action was brought. The defendants claimed that the contract was void because B had not acted with the others. The court held for the plaintiff.

“It is well settled,” said the court, “as a general doctrine in the law of agency, that when an authority to act in a matter of private nature is conferred by the principal upon more than one person, all must act in the execution of the power. \* \* \* The patrons lived in the vicinity of the factory. Some of them, not on the committee, were present at times when the question of the sale of the cheese was considered. \* \* \* It cannot be assumed, under the circumstances, that the principals were ignorant of the conduct of their agents; but the presumption is that they understood the course of the business and

dealings with the common property, especially since no evidence was given on their part that they were not informed thereof. The concurrence of Keeler and Morse, two of the committeemen, in making the contract sued upon was sufficiently shown, and the defendants were bound by it.”<sup>21</sup>

**§ 38. Joint agents—Public service by.** If joint agents are appointed with duties involving public welfare, or whose duties are defined by law rather than by the principal in whose behalf they are to act, a different rule applies. If due notice is given to all, such as to the directors of a corporation, and less than the whole number meet, but there is a quorum present, official action may be taken as though all were present. Such action will be binding upon the principal.<sup>22</sup>

There is a sound basis of logic for this rule. The difficulty of securing the attendance of every member of a committee having to do with public affairs would hamper public service. But under this rule the purposes for which the agents were appointed may be accomplished despite the non-concurrence of some of the number.

**§ 39. Joint and several agents.** If the principal appoints two or more persons to act as his agents

<sup>21</sup> *Hawley v. Keeler*, 53 N. Y. 121, M. 50.

<sup>22</sup> *First Nat. Bank v. Mt. Tabor*, 52 Vt. 87, 36 Am. Rep. 734, M. 52; *Martin v. Lemon*, 26 Conn. 192; *Williams v. School Dist.*, 21 Pick. (Mass.) 75, 32 Am. Dec. 243; *McNeil v. Chamber of Commerce*, 154 Mass. 277, M. 63.

with joint and several powers, any one of the agents may act independently of the others; but if more than one is to act, all must act. The agents have the power to elect in what way they will exercise the power, as the united action of all, or as the individual action of one of the number.<sup>23</sup>

**§ 40. Sub-agents.** If a principal has expressly authorized the agent to appoint sub-agents, or the circumstances are such as to impliedly authorize the agent to make such appointments, the sub-agents so appointed have the same authority to bind the principal as though they had been appointed by the principal himself.

If no express or implied authority is given the agent to appoint sub-agents, he may nevertheless make such appointments as to duties that do not involve a trust or confidence in him alone. This subject will be more fully discussed hereafter.<sup>24</sup>

**§ 41. Who may be a servant.** We have already seen<sup>25</sup> that a servant is one who performs service for another of a nature that does not require making of contracts nor the exercise of a high degree of mental capacity. It follows, therefore, that anyone who possesses sufficient mental capacity to obey orders, and sufficient physical capacity to perform the act called for may be a servant.

<sup>23</sup> *Deakin v. Underwood*, 37 Minn. 98, 5 Am. St. Rep. 827, M. 68.

<sup>24</sup> See §§ 42-46.

<sup>25</sup> See § 8, (ante).

## CHAPTER IV

### WHAT ACTS MAY BE DONE THROUGH AN AGENT

- § 42. What acts may be done through an agent.
- § 43. Acts involving personal trust cannot be delegated.
- § 44. Acts required by statute to be performed in person.
- § 45. Acts permitted by statute to be performed by agents.
- § 46. Acts contrary to public policy cannot be delegated.

**§ 42. What acts may be done through an agent.** Generally speaking, anything that a principal may lawfully do if acting in person he may delegate to agents. The ordinary test, therefore, of whether a given act can be delegated to an agent is whether the act itself would be legal if performed by the principal in person. There are certain acts, however, legal and proper in themselves which the principal cannot delegate to an agent, and to these acts or classes of acts our attention must now be directed.

**§ 43. Acts involving personal trust cannot be delegated.** If a person is acting in any capacity that involves personal trust or confidence reposed in him by another, or by the public, he cannot delegate his duties to an agent. If he desires to lay aside his duties he must either resign and allow a successor

to be appointed, or induce his principal to appoint assistants in whom the principal also reposes trust and confidence. But the law denies him the right to delegate personally any duties except such as do not involve discretion, or such as he may personally supervise.

For example: A is appointed trustee of a large estate and his appointment is of course due to confidence reposed in him for his business ability and personal integrity. He could not lawfully delegate the investment of trust funds; nor the management of the estate; nor any duty in connection with the estate that demanded the skill or judgment which he is reputed to possess. But he could delegate clerical work; the collection of rents; the superintendence of factories or farms belonging to the estate, and such other acts as would ordinarily be entrusted to subordinates, exercising due oversight, however, over the work of such subordinates.

**§ 44. Acts required by statute to be performed in person.** If persons who desire to perform certain acts or to incur certain liabilities are required by statute to act in person, they cannot appoint agents to act for them. In event of such appointment, the acts performed by the agent in their behalf are null and void.<sup>1</sup>

<sup>1</sup> Minn. Trust Co. v. School District, 63 Minn. 414, 71 N. W. Rep. 679; Hyde v. Johnson, 2 Bing. (N. C.) 776, W. 37; United States v. Bartlett, Dav. (U. S.) 9, Fed. Cas. No. 14,532; Swift v. Jewsbury, L. R. 9 Q. B. 301; London, etc., Bank, ex parte Birmingham Co., L. R. 3 Ch. App. 651, R. 53.

For example: The defendant owed the plaintiff a debt which was barred by the Statute of Limitations. At defendant's request the defendant's wife wrote a letter in his behalf to the plaintiff offering to pay the debt in instalments, and this letter was duly received by the plaintiff. Later the defendant refused to pay and, upon suit being brought, he defended on the ground that a promise signed by an agent could not revive the debt, since the statute provided that a debt barred by the Statute of Limitations could only be revived by a written promise signed "by the party chargeable thereby." The court held for the defendant, on the ground that the language quoted indicated the intention that no one but the principal himself could act.

"The Legislature has, in many states," said the court, "given equal efficacy to written instruments when signed by the parties and when signed by their agents; but in all those cases express words have been employed for that purpose. The Statute of Frauds, in its third section, requires for the purpose of that section, a note in writing to be signed by the party, 'or their agents thereunto lawfully authorized by writing.' \* \* \* It appears therefore that the legislature well knew how to express the distinction, not only between a signature by the party, and a signature by his agent, but also to describe the different modes by which agents for different purposes are to be appointed."<sup>2</sup>

<sup>2</sup> Hyde v. Johnson (supra).

**§ 45. Acts permitted by statute to be performed by agents.** In all ordinary cases, however, where a signed memorandum is required by statute a provision is either inserted in the statute to the effect that an agent may act, as is the case in the Statute of Frauds, or the circumstances are such that a court will construe the statute as permitting agents to act.<sup>3</sup>

For example: A statute provided that "any seven or more persons associated for any lawful purpose may by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this act in respect to registration, form an incorporated company." The statute also provided that the memorandum of association "shall be signed by each subscriber in the presence of, and attested by, one witness at least."

C, desiring to become a member of an association under the provisions of this statute, authorized O, both orally and by telegram, to sign C's name to the memorandum. O signed C's name and in litigation subsequently arising it was sought to hold C as a member of the company. He defended on the ground that the signature made in his behalf by O was not binding under the statute. The court held that C was bound. Said the court: "In every case where an act requires a signature it is a pure question of construction on the terms of the particular act whether the words are satisfied by a signature by an agent.

<sup>3</sup> In re Whitley Partners, 32 Ch. D. 337, W. 39.

\* \* \* In the present statute there is nothing in the way in which the memorandum of association is dealt with to show that the legislature intended anything special as to the mode of signature. The principle of *Hyde v. Johnson* therefore cannot be invoked in this case, and the general rule that a man may sign by an agent is not interfered with.”<sup>4</sup>

**§ 46. Acts contrary to public policy cannot be delegated.** If the act contemplated by a person is contrary to good morals or public policy, or involves the commission of an offense against the laws of the land, the appointment of an agent to perform such act is null and void. Although, as we shall later see, the acts of an agent so appointed may impose liabilities upon the principal, yet the principal can acquire no rights as against third parties in consequence of the acts.

As between the principal and the agent, neither can maintain an action against the other arising from the transaction. If the principal has not paid the agent, the latter cannot collect compensation. If, on the other hand, he has paid the agent he cannot recover it back on the ground of illegality of the transaction. In short, the law will leave the parties where they have placed themselves.

**Example One:** The plaintiff undertook to procure certain legislation for the benefit of the defendant and agreed to use “his utmost influence and exer-

<sup>4</sup> Bowen, L. J., in *In re Whitley Partners* (supra).

tions to procure the passage into a law of the bill heretofore introduced into the senate of the state of New York.” Later the plaintiff sued the defendant for failure to fulfill his part of the agreement, but the court held that the plaintiff could not recover upon the ground that the contract relied upon was illegal and void.<sup>5</sup>

Example Two: The defendants, owners of land in a city, agreed with the owners of an adjacent building that if the latter would offer that building to the government for a postoffice for a nominal rent for ten years, and use all “proper persuasion” to secure its acceptance, they would pay them a certain sum annually for that period, in case of the government’s acceptance. The building was accepted by the government and the defendants now decline to pay the annual instalments. The court held for the defendants. Said the court: “Where the general public has an interest in the location of an office, a railroad station, or the like, a contract to secure its location at a particular place is held to be against public policy and not enforceable. \* \* \* Here the motive of the contracting parties was to secure the location of a public office to advance their private interests, and not to benefit the public.”<sup>6</sup>

<sup>5</sup> *Mills v. Mills*, 40 N. Y. 543, 100 Am. Dec. 535, M. 17; *Trist v. Child*, 21 Wall. (U. S.) 441; *Spalding v. Ewing*, 149 Pa. St. 375, 24 Atl. R. 219, 15 L. R. A. 727; *Houlton v. Dunn*, 60 Minn. 26, 61 N. W. 898, 30 L. R. A. 737; *County of Colusa v. Welch*, 122 Cal. 428, 55 Pac. R. 243.

<sup>6</sup> *Elkhart County Lodge v. Crary*, 98 Ind. 238, 49 Am. Rep. 746, M. 18; *Wasserman v. Sloss*, 117 Cal. 425, 49 Pac. R. 566; *Beal v. Polhemus*, 67 Mich. 130; *Commonwealth v. Press Co.*, 156 Pa. St. 516, 26 Atl. Rep. 1035; *Stanton v. Embrey*, 98 U. S. 548, M. 631.

## CHAPTER V

### MODES OF CREATING AGENCY

- § 47. Agency a contractual relation.
- § 48. How agency may arise.
- § 49. By appointment—Acceptance by agent.
- § 50. Appointment in writing—Sealed instruments.
- § 51. To fill blanks in sealed instruments.
- § 52. When agents act is unknown to grantee.
- § 53. Parol authority sufficient in some jurisdictions.
- § 54. Seal disregarded, when.
- § 55. Effect of principals acknowledgment of unauthorized deed.
- § 56. Effect of execution of deed in presence of principal.
- § 57. Appointment to execute simple writing under statute.
- § 58. Contract of employment under statute.
- § 59. Appointment to negotiate simple contract.
- § 60. Evidence of appointment.

**§ 47. Agency a contractual relation.** Although agency doubtless originated from the relation of master and servant, and the latter relation in its turn originated from enforced servitude of the servant, yet today agency is purely a contractual relation. The agent becomes such upon the express or implied request of the principal, and serves him generally for a stipulated compensation. The principal and the agent are usually for all purposes, except in their business relations, equals before the law and each equally capable of transacting business in his own behalf.

“Even where a man employs as his agent,” says Sir William Anson, “one who is incapable of entering into a contract with himself, as when he gives authority to his child, being an infant, the authority must be given, it is never inherent. There must be evidence of intention on the one side to confer, on the other to undertake, the authority given, though the person employed may from defective status be unable to sue or be sued on the contract of employment.”<sup>1</sup>

**§ 48. How agency may arise.** There are four methods of establishing the relation of agency. (1) By an appointment prior to the acts performed under the agency. (2) By ratification of unauthorized acts already performed. (3) By estoppel, that is, where the principal's conduct with reference to the alleged agency has been such that the courts will not permit him to deny the agency. (4) By necessity, that is, where the law gives one person authority to bind another with or without his consent. Each of the four methods will now be treated, in the order given.

**§ 49. Agency by appointment — Acceptance by agent.** Agency by appointment results from an express or implied contract between the principal and the agent. The principal must manifest his desire that the agent shall act for him in the transaction in question, and the agent must accept the proffered

<sup>1</sup> Anson on Contracts, 330.

agency. If the agent declines to act, no rights or liabilities can arise for either the principal or the person attempting to deal with the supposed agent in the principal's stead.

Example One: B was indebted to L. He wrote to L offering to pay him in cotton bagging, at thirty-three cents per yard, by instalments, at certain periods. L wrote in reply "We are willing to take cotton bagging in liquidation of the three last notes, delivered at the period you propose, but not at the price you offer it." An offer was made in this letter and certain conditions were imposed upon B which must be fulfilled before he could claim the benefit of the offer. L further directed B to deal with M, his local representative, to whom he proposed immediately to write concerning the matter. B shortly after notified M of his acceptance of the terms of L's offer. But L had not written to M and the latter refused to act in the matter. B remained under the impression that his acceptance was good notwithstanding M's want of instructions at the time of notification. B now sues L upon the alleged agreement.

The court held that L was not liable. Said the court: "Something remained for Barr to do. The notification of his acceptance was necessary to fasten the agreement upon Lapsley. For this purpose he very rationally addressed himself, in the first place, to McCoun; and the reference to Lapsley's letter would have been a sufficient excuse for not returning an answer until a reasonable time had elapsed

for McCoun to receive the expected communication from Lapsley. But when he found McCoun uninstructed, and unwilling to act under the letter addressed to Barr, his course was plain and unequivocal. A letter to Lapsley, transmitted by the mail, would have put an end to all doubt and difficulty. This is the method he ought to have pursued, and for not having pursued this course, we are of the opinion that the bill was properly dismissed below.”<sup>2</sup>

Example Two: The defendant was indebted to the plaintiff in the sum of \$147. He deposited that amount with M and notified the plaintiff of this fact. The plaintiff who was located in another town wrote to M as follows: “We hold a note of \$147 on John Free, payable at Iconium, and we understand the money has been left with you for its payment. Next time any of you come to Albia, or if you sooner get a chance to send it by a reliable party, please send it in and oblige.” Shortly after this letter was received by M, his house was robbed and the money taken. The plaintiff sued the defendant for non-payment of the note. The defendant contended that M was acting as agent of the plaintiff at the time of the loss and hence that the loss must be borne by the plaintiff. But the court held otherwise.

“The plaintiff did, it is true,” said the court, “propose to Maiken that he should carry or send the money to Albia. If Maiken had undertaken to do so,

<sup>2</sup> Barr v. Lapsley, 1 Wheat. (U. S.) 151.

it may be that in doing so he would have been acting as the plaintiff's agent. But Maiken never acted nor agreed to act for the plaintiff. To constitute a person an agent, there must be consent on the part of the agent, either expressed by words or inferable from something done. But in this case there appears to have been neither."<sup>3</sup>

**§ 50. Appointment in writing — Sealed instruments.** It is a well established rule of the common law that if an agent is appointed to execute a sealed instrument in behalf of his principal, the appointment itself must be by an instrument under seal,<sup>4</sup> or as it is known in the law, by power of attorney.

For example: A, who owns a piece of real estate in the town of X, negotiates for its sale through his agent B. Being unable to be present at the time set for the transfer of the land, he sends a telegram to B authorizing him to execute a proper deed in his behalf and to acknowledge the same. B acts accordingly. A dies and his heirs bring action to have the conveyance set aside and to recover the land. The conveyance is invalid, because B's authority to execute the deed should have been under seal.

<sup>3</sup> First National Bank of Albia v. Free, 67 Iowa 11, R. 101.

<sup>4</sup> Peabody v. Hoard, 46 Ill. 242; Humphreys v. Finch, 97 N. Car. 303, 1 S. E. Rep. 870, 2 Am. St. Rep. 293; Rowe v. Ware, 30 Ga. 278; Perry v. Smith, 29 N. J. L. 74; Gordon v. Bulkeley, 14 S. & R. (Pa.) 331; Blood v. Goodrich, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121; Ban-orgee v. Hovey, 5 Mass. 11, 4 Am. Dec. 17; Paine v. Tucker, 21 Me. 138, 38 Am. Dec. 255.

§ 51. **Appointment to fill blanks in sealed instruments.** It sometimes occurs that a principal leaves with an agent an instrument which he has signed and sealed and which is ready for delivery, except that the terms of the conveyance are left blank. He instructs the agent as to the filling of the blank when the final terms shall have been concluded and requests him to deliver the deed in his behalf. The question arises whether the agent may fill the blank in question.

The same rule applies as in the case of authorizing the agent to execute a deed in the principal's behalf—the authority must be conferred by an instrument under seal. If the agent acts under parol authority, and the other party is aware that the blank has been filled by the agent, the conveyance has no validity as a sealed instrument.

For example: The defendant, being about to remove from O to a distant part of the State, authorized H to sell for him lands which he owned in O. In order that this might be done the defendant prepared a deed, describing the premises, and purporting to convey the same in fee, but having therein blanks as to the name of the grantee and the price. He instructed H, when he should make a sale of the land, to fill in the said blanks and deliver the deed to the purchaser. H sold the land to the plaintiff at a fair and reasonable price, filled the blanks in the deed and delivered it, both parties believing it to be a valid conveyance. Later the defendant re-

fused to consider the deed as binding upon him; and the Court held that the instrument was not operative as a deed.<sup>5</sup>

**§ 52. Where the agent's act is unknown to grantee.** If, however, the agent with whom a deed has been left with instructions to fill blanks therein, fills the blanks without the actual or implied knowledge of the grantee, the deed will be binding upon the principal, even though the agent has exceeded his authority in fixing the terms of the conveyance. This rule has a sound basis of logic. The grantee who acts in good faith should be protected, and the principal who has put it in the agent's power to act wrongfully should bear the loss.

Example One: P, who was the holder of a certain mortgage of real estate, executed and acknowledged an assignment thereof, leaving the name of the assignee blank. P left the blank assignment with his son and orally authorized him to write in the name of the assignee when he should succeed in negotiating the mortgage. The son did as requested and delivered the assignment to S, who took in good faith without knowledge of the manner in which his name had been inserted in the assignment. Later S brought a writ of entry to foreclose the mortgage, and the defense was that the assignment from P was invalid. The court held that S could recover.

“When a grantor signs and seals a deed,” said

<sup>5</sup> Blacknall v. Parish, 6 Jones Eq. (N. C.) 70, W. 62.

the court, "leaving unfilled blanks, and gives it to an agent with authority to fill the blanks and deliver it, if the agent fills the blanks as authorized and delivers it to an innocent grantee without knowledge, we think the grantor is estopped to deny the deed as delivered was his deed. Otherwise he may by his voluntary act enable his agent to commit a fraud upon an innocent party. \* \* Few deeds are written by the grantors. Most are written by scriveners, and a grantee to whom a deed is delivered has no means of determining whether the body of the deed was written before or after the signature was affixed." <sup>6</sup>

Example Two: The defendants having signed a probate bond for \$2,000 which turned out to be wrong in form, signed another in blank and intrusted it to A, for whose good conduct they were becoming surety. A filled out the bond for a larger sum than \$2,000. For misconduct on A's part in connection with his official duties, the judge of the Probate Court sued the defendants upon the bond. They defend on the ground that A could not bind them by filling in a material blank contrary to his instructions. The court held that the defendants were liable.

"We are of the opinion," said the court, "that, when a bond such as this is intrusted to the principal for his use, to fill it up and deliver it, the possibility of his being required by the probate judge

<sup>6</sup> Phelps v. Sullivan, 140 Mass. 36, 54 Am. Rep. 442, M. 101, W. 72.

to insert a penal sum larger than the surety directed, and of his doing so, is so obvious and so near, that the surety must be held to take the risk of his principal's conduct, and is bound by the instrument as delivered, although delivered in disobedience of orders, if, as here, the obligee has no notice, from the face of the bond or otherwise, of the breach of orders. To hold otherwise would be to disregard the habits of the community."<sup>7</sup>

§ 53. **Parol authority to fill blanks sufficient in some jurisdictions.** The rule is well established in some jurisdictions that parol authority is sufficient to authorize the filling of blanks even in deeds.<sup>8</sup> This rule is doubtless due to the fact that the seal is losing much of its common law significance.

"At the present day," said a Minnesota judge,<sup>9</sup> "the distinction between sealed and unsealed instruments is arbitrary, meaningless, and unsustained by reason. The courts have, for nearly a century, been gradually doing away with the former distinctions between these two classes of instruments and if

<sup>7</sup> *White v. Duggan*, 140 Mass. 18, 54 Am. Rep. 437, W. 70.

<sup>8</sup> *State v. Young*, 23 Minn. 551; *Cribben v. Deal*, 21 Ore. 211, 27 Pac. 1046, 28 Am. Rep. 746, *Palacios v. Brasher*, 18 Colo. 593, 34 Pac. 251, 36 Am. Rep. 305; *Van Etta v. Evenson*, 28 Wis. 33, 9 Am. Rep. 486; *Swartz v. Ballou*, 47 Iowa 188, 29 Am. Rep. 470; *Field v. Stagg*, 52 Mo. 534, 14 Am. Rep. 435; *State v. Pepper*, 31 Ind. 76; *Wiley v. Moor*, 17 S. & R. (Pa.) 438, 17 Am. Dec. 696; *Bridgeport Bank v. Railroad Co.*, 30 Conn. 274; *Inhabitants of So. Berwick v. Huntress*, 53 Me. 89, 87 Am. Dec. 535.

<sup>9</sup> *Mitchell J.*, in *State v. Young*, 23 Minn. 551.

they have not yet wholly disappeared it simply proves the difficulty of disturbing a rule established by long usage, even if the reason for the rule has wholly ceased to exist. We, therefore, hold that parol authority is sufficient to authorize the filling of a blank in a sealed instrument, and that such authority may be given in any way in which it might be given in case of an unsealed instrument.”

**§ 54. Seal disregarded—When.** It is generally held that if an agent, without authority to execute a sealed instrument, affixes a seal when none is in fact essential, the seal will be disregarded and the instrument will stand as a simple writing.<sup>10</sup>

For example: Platt, as agent for Carpenter, executed an agreement under seal with Long, by which Carpenter agreed to convey two lots of land, on terms therein stated. Carpenter conveyed one lot and after his death, which followed shortly, an action was brought against his administrator to recover damages for not conveying the other. Platt’s authority to make the contract was by parol. The court held for the plaintiff.

“Our Statute of Frauds,” said the court, “does not require the agent’s authority to be in writing. It exacts a written contract, not a written power to the agent. \* \* \* The fact that the contract in

<sup>10</sup> Long v. Hartwell, 34 N. J. L. 116, M. 92; Dickerman v. Ashton, 21 Minn. 538, W. 67; Minor v. Willoughby, 3 Minn. 225; Wagoner v. Watts, 44 N. J. L. 126; Contra, Wheeler v. Nevins, 34 Me. 54.

this case was sealed by the agent does not vitiate it. There is no doubt about the general rule that a power to execute an instrument under seal must be conferred by an instrument of equal solemnity. If the writing given by the agent be under seal and that be essential to its validity, the authority of the agent must be of equal dignity or it cannot operate. Here a seal was not vital to the contract; there was no authority to the agent to attach a seal, therefore the seal is of no value, but the power to execute the contract without seal having been ample, so far it becomes the act of the principal, and inures as a simple contract.”<sup>11</sup>

**§ 55. Effect of principal's acknowledgment of unauthorized deed.** If a person in whose behalf a deed has been executed by another who has acted without authority, duly acknowledges the instrument, it thereupon becomes as binding as though the person acknowledging it had executed it in the first instance. By “acknowledgment” is meant the formal affirmation before a justice of the peace, notary public, or other officer qualified to administer oaths, that the instrument in question is “the free act and deed” of the person making such affirmation.

This question arose in the case of *Clough v. Clough*,<sup>12</sup> and in disposing of the case the court said: “If one acknowledges and delivers a deed

<sup>11</sup> *Long v. Hartwill* (supra).

<sup>12</sup> 73 Me. 487, W. 68.

which has his name and a seal affixed to it, the deed is valid. No matter by whom the name and seal were affixed. No matter whether with or without the grantor's consent. The acknowledgment and delivery are acts of recognition and adoption so distinct and emphatic that they preclude the grantor from afterward denying that the signing and sealing were also his acts. They are his by adoption. Without delivery the instrument has no validity. By the force of our statutes the instrument is incomplete without acknowledgment. Till one or both of these acts are performed the instrument has no more validity than a blank deed. By taking the instrument in this incomplete condition and completing it, the grantor makes it his deed in all its particulars."

**§ 56. Effect of execution of deed in presence of principal.** It sometimes happens that a person who is about to execute a sealed instrument orally requests another to sign his name for him and is present while the act is being performed. Such a signature is valid,<sup>13</sup> even in jurisdictions adhering most strongly to the common law doctrine that authority to execute a deed must be by an appointment under seal.

<sup>13</sup> *Gardner v. Gardner*, 5 Cush. (Mass.) 483, 52 Am. Dec. 741, M. 100; *Bigler v. Baker*, 40 Neb. 325, 58 N. W. Rep. 1026; 24 L. R. A. 255; *Mutual Benefit Life Ins. Co. v. Brown*, 30 N. J. Eq. 193; *Croy v. Busenbark*, 72 Ind. 48, R. 85; *Eggleston v. Wagner*, 46 Mich. 610, 10 N. W. Rep. 37; *Jansen v. McCahill*, 22 Cal. 563, 83 Am. Dec. 84.

For example: Action was brought for the foreclosure of a mortgage which had been executed under the following circumstances. Polly Gwinn, the grantor, did not sign in person. She was in the room when the mortgage was being drawn and her daughter asked if she should not sign for her. The grantor assented by a nod and the daughter wrote, "Polly Gwinn, by Mary G. Gardner." The court held that the mortgage was valid. "The name being written by another hand," said the court, "in the presence of the grantor, and at her request, is her act. The disposing capacity, the act of mind, which are the essential and efficient ingredients of the deed, are hers, and she merely uses the hand of another, through incapacity or weakness, instead of her own, to do the physical act of making a written sign. Whereas, in executing a deed by attorney, the disposing power, though delegated, is with the attorney, and the deed takes effect from his acts, and therefore the power is to be strictly examined, and the instrument conferring it is to be proved by evidence of as high a nature as the deed itself. To hold otherwise would be to decide that a person having a clear mind and full capacity, but through physical inability incapable of making a mark, could never make a conveyance or execute a deed; for the same incapacity to sign and seal the principal deed would prevent him from executing the letter of attorney under seal."<sup>14</sup>

<sup>14</sup> Gardner v. Gardner (*supra*).

**§ 57. Appointment to execute simple writing—Under statute.** The original Statute of Frauds as enacted in England provided two methods of appointing agents to execute written contracts that came within its provisions. The first and third sections required a writing signed by the party to be charged or “by agents thereunto lawfully authorized by writing.”<sup>15</sup> The fourth and seventeenth sections, however, provide that the writing shall be signed by the person to be charged or by “some other person thereunto by him lawfully authorized.”

Under the sections first quoted, therefore, it was essential that an agent appointed to execute the requisite writing must have been appointed in writing, whereas no written appointment was essential under the fourth and seventeenth sections. Many American jurisdictions have incorporated the larger portion of the original Statute of Frauds in their own statutes. In some States similar provisions for the appointment of agents are still in force. The local statutes should, therefore, be consulted to determine whether or not an appointment of an agent in a particular case need be in writing.

**§ 58. Contracts of employment under statute.** One of the provisions of the fourth section of the Statute of Frauds is that “no action shall be brought whereby to charge the defendant \* \* \* upon any agreement that is not to be performed within the

<sup>15</sup> 29 Car. II, Ch. 3.

space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.”

The effect of this provision of the statute upon contracts of employment is obvious. If a contract is made whereby an agent is to be employed for a term exceeding one year, the appointment, or contract, must be in writing.<sup>16</sup>

Example One: A orally appoints B as his agent for a period of fourteen months. After one month he discharges B. The latter has no right of action for breach of contract because the appointment was not in writing.

Example Two: The defendant agreed to employ the plaintiff as his agent for a period of five years, or so long as one L, who had acted in hiring the plaintiff, should remain in their employ. The court held that this contract did not come within the statute because of the alternative clause as to the continued employment of L, who might leave their employ within the year; hence the agreement need not be in writing.<sup>17</sup>

<sup>16</sup> *Bracegirdle v. Heald*, 1 B. & Ald. 722; *Snelling v. Huntingfield*, 1 C. M. & R. 20; *Williams v. Bemis*, 108 Mass. 91, 11 Am. Rep. 318. For a more complete explanation of this clause of the statute see “*Archer on Contracts*,” §§ 147-149.

<sup>17</sup> *Roberts v. Rockbottom Co.*, 7 Mete. (Mass.) 46.

**§ 59. Appointments to negotiate simple contracts.**

If an agent is appointed to negotiate a contract which does not require the execution of an instrument under seal, nor involve statutes which require authority to be in writing, the appointment may be conferred without a writing. All simple contracts may be entered into in behalf of a principal by an agent having oral authority merely.

The statement is frequently encountered in law reports that an agent's authority must be of as high a character as the act to be performed. This would seemingly indicate that authority to execute a simple written contract must be conferred by a written authorization. The law is now well settled, however, that oral authority is sufficient to authorize the agent to enter into simple written contracts for his principal. The statement referred to was originally accurate, for under the early common law but two classes of contracts were recognized—contracts under seal and oral contracts. Simple written contracts were unknown.<sup>18</sup> Changed conditions of society, however, have made necessary judicial recognition of this third class of contracts, and also of the necessity of permitting agents to act therein, even though their authority is not in writing.

<sup>18</sup> "All contracts are by the laws of England distinguished into agreements by specialty, and agreements by parol; nor is there any such third class, as some of the counsel have endeavored to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved." *Skyenner, C. B.*, in *Rann v. Hughes*, 7 T. R. 346.

An agent acting under oral authority may, therefore, execute simple written contracts, bills of exchange or promissory notes<sup>19</sup> and contracts for the sale of real estate.<sup>20</sup>

For example: The plaintiff's agent negotiated with the defendant to purchase from him 627 quintals of fish. An understanding was reached, but no money paid nor writings passed. Defendant instructed the agent to call upon his own agent, C, on the following day to get C to sign a contract in his behalf. This was accordingly done, although C had no written authority to sign a contract for the defendant. C gave defendant a copy of the contract, but the defendant did not then repudiate it. Later, however, the price of fish advanced and the defendant refused to stand to the agreement. The plaintiff brought suit, and it was alleged in defense that C had no authority to act. The court held that there was no necessity that C should have acted under written authority, and that the defendant was liable.<sup>21</sup>

**§ 60. Evidence of appointment.** A person dealing with an agent who claims to be acting under an appointment from his principal does so at his own peril if there are no other evidences of the appoint-

<sup>19</sup> Long v. Colburn, 11 Mass. 97, 6 Am. Dec. 160.

<sup>20</sup> Long v. Hartwell, 34 N. J. L. 116; Keim v. O'Reilly, 54 N. J. Eq. 418, 34 Atl. Rep. 1073; Curtis v. Blair, 26 Miss. 309, 59 Am. Dec. 257; Baum v. Dubois, 43 Pa. 260; Johnson v. Dodge, 17 Ill. 433; Hammond v. Hannin, 21 Mich. 374, 4 Am. Rep. 490.

<sup>21</sup> Shaw v. Nudd, 8 Pick. (Mass.) 9.

ment than the agent's own statements. If the supposed principal denies having appointed the agent and there is no evidence to corroborate the agent's statements, the supposed principal cannot be charged with liability for the agent's acts, or upon his admissions.<sup>22</sup>

For example: The plaintiff brought suit against the defendant to recover for certain doors and blinds sold and delivered to the defendant. It was contended by the defendant that he had been through bankruptcy; that the claim had been proven by one F as agent of plaintiff, and that F had assented to his discharge in bankruptcy. The plaintiff declared that F was the father of his late partner, but had no authority to act as an agent in the matter. The court held for the plaintiff.

"Authority to act for the plaintiff," said the court, "could not be proved by the declarations of the party assuming to act as such. Neither would such declarations be competent to prove that the person making them was the real party to whom the demand belonged. The plaintiff's rights ought not to be affected by such declarations of another party. The defendant had no ground of exception to the exclusion of this testimony from the consideration of the jury."<sup>23</sup>

<sup>22</sup> Baker v. Gerrish, 14 Allen (Mass.) 201; Hart v. Waterhouse, 1 Mass. 433; Hatch v. Squires, 11 Mich. 185, M. 106; Konemann v. Monaghan, 24 Mich. 36; Graves v. Horton, 38 Minn. 66, M. 82; Mul-lanphy Savings Bank v. Schott, 135 Ill. 655, 26 N. E. Rep. 640, 25 Am. St. Rep. 401.

<sup>23</sup> Baker v. Gerrish (supra).

## CHAPTER VI

### MODES OF CREATING AGENCY—Continued

- § 61. Agency by ratification.
- § 62.     How the question may arise.
- § 63.     How an act may be ratified.
- § 64.         Ratification of instruments under seal.
- § 65.         Of simple written contracts.
- § 66.         Implied ratification.
- § 67.             By acceptance of benefits.
- § 68.             By asserting rights arising from contract.
- § 69.             By silence after notification.
- § 70.     Knowledge of facts essential to ratification.
- § 71.         Implied knowledge of facts.
- § 72.     Effect of ratification.
- § 73.     What acts may be ratified.
- § 74.         Ratification of a forgery.
- § 75.         An act cannot be ratified in part.
- § 76.     What acts are incapable of ratification.
- § 77.     Who may ratify.
- § 78.         Principal must be an existing person.
- § 79.         Contract must be in behalf of.

**§ 61. Agency by ratification.** Agency by ratification arises whenever a person adopts or affirms an unauthorized act performed in his behalf by another. The person ratifying becomes the principal and the person who has performed the act becomes an agent, so far as the legal consequences of the act itself are concerned.

**§ 62. How the question may arise.** Agency by ratification may arise under two sets of circumstances: First—Where the person performing the act or rendering the service is not an agent in any sense, but acts wholly as a volunteer. Second—Where the person performing the act or rendering the service is already an agent in other matters, but simply lacks authority to perform the act in question.

Example One: A and B are business acquaintances. B is wealthy and has some reputation as a collector of rare paintings. A, in visiting a certain town, discovers an old painting that he considers of great value. The price set upon it is very reasonable and A, believing that B will gladly purchase the painting, contracts with the dealer in B's behalf to purchase the picture, the price to be paid after B has had opportunity to inspect and approve the picture. B ratifies A's act and tenders the agreed price, but the dealer now realizes that the picture is worth more money and declines to part with it that rate. The dealer must sell the picture at the price agreed upon, or pay damages for breach of contract. This is a case of agency by ratification, even though A was a mere volunteer and had never acted as B's agent before.

Example Two: X engages Y to take charge of a branch of his business in the city of Boston. He gives Y instructions to sell goods for cash only and the store is known as a "cash store." Y disregards

instructions in a certain instance, and sells goods on credit to W. X, upon learning of the circumstances, approves of the act. Later a creditor of W attaches the goods in question as the property of W. X thereupon attempts to repudiate the transaction and recover the goods. He cannot succeed, since his approval of Y's unauthorized act operated as a ratification of Y's agency in that particular.

**§ 63. How an act may be ratified.** An act may be ratified in any of the various ways in which a person may openly indicate his adoption or affirmation of the act in question. Words which plainly indicate the principal's intention to abide by the agent's act, or conduct that discloses a similar intention, would amount to ratification. Thus it is to be seen that ratification may be either express or implied.

As a general rule, the act of ratification must be of the same nature as would be required to confer authority to perform the act in question in the first instance.

**§ 64. Ratification of instruments under seal.** It is usually held that if a person acting without authority executes a sealed instrument in behalf of another, the act can be ratified only by an instrument under seal.<sup>1</sup> There is a tendency in some juris-

<sup>1</sup> *Stetson v. Patten*, 2 Me. 358, W. 992; *Spofford v. Hobbs*, 29 Me. 148, 48 Am. Dec. 521; *Heath v. Nutter*, 50 Me. 378; *Polland v. Gibbs*, 55 Ga. 45; *Grove v. Hodges*, 55 Pa. 504; *Blood v. Goodrich*, 12 Wend. (N. Y.) 525; 27 Am. Dec. 152; *Dispatch Line of Packets v. Manufacturing Co.*, 12 N. H. 205, 37 Am. Dec. 203.

dictions, however, to disregard the common law rule in this respect and to permit ratification of sealed instruments even by oral ratification.<sup>2</sup>

Example One: C made a contract with the plaintiff for the purchase from him of certain lands and the buildings thereon for seven thousand eight hundred and fifty dollars. C claimed to be acting for himself and also for P and Y. He signed a sealed agreement for himself and the others. The only evidence of authority of C was that P, upon being informed of C's act, had consented to be bound by the instrument and that he had got from the plaintiff an extension of time upon it. The court held, upon suit being brought against P upon the agreement, that P was liable. Said the court:

"The defendant contends that a sealed instrument, executed without previous authority can be ratified only by an instrument under seal. However this may be elsewhere, by the law of Massachusetts such instrument may be ratified by parol."<sup>3</sup>

Example Two: A wife, who owned land, executed a deed, leaving therein blanks for the name of the grantee, the date and the consideration. She delivered this instrument to her husband, who later sold the land to the defendant, filling in the blank,

<sup>2</sup> *Cady v. Shepherd*, 11 Pick. (Mass.) 400, 22 Am. Dec. 379; *Swan v. Stedman*, 4 Met. (Mass.) 548; *McIntyre v. Park*, 11 Gray (Mass.) 102; 71 Am. Dec. 690; *Zimpelman v. Keating*, 72 Tex. 318, 12 S. W. Rep. 177; *Reed v. Morton*, 24 Neb. 760, 40 N. W. Rep. 282, 8 Am. St. Rep. 247.

<sup>3</sup> *McIntyre v. Park* (supra).

in the deed, and delivering it to the defendant as grantee. The wife, knowing these facts, received and used the consideration. This was held to be a sufficient ratification of the deed.<sup>4</sup>

**§ 65. Ratification of simple written contracts.** A simple written contract may be ratified orally in all jurisdictions. This applies as well to writings executed under the Statute of Frauds as to any other form of written contract.<sup>5</sup> There are, however, some jurisdictions in which the Statute of Frauds specifically requires that the authority of an agent to act under its provisions must be in writing. This would render necessary a ratification in writing.<sup>6</sup>

For example: Defendant authorized H in writing to sell his property for \$1,400. H made a contract in writing as the agent of the defendant to convey the lands to the plaintiff for \$1,300. The only evidence of defendant's ratification was that when informed by letter of the sale the defendant did not manifest any disapproval of the act, but shortly afterward sold the property to another person. There existed in that jurisdiction a statute which read, "No contract for the sale of lands made by

<sup>4</sup> Reed v. Morton, 24 Neb. 760, 40 N. W. 282.

<sup>5</sup> Keim v. O'Reilly, 54 N. J. Eq. 418, 34 Atl. Rep. 1073; Ehrmantraut v. Robinson, 52 Minn. 333, 54 N. W. Rep. 188; McLean v. Dunn, 4 Bing. 722; Hawkins v. McGroarty, 110 Mo. 546.

<sup>6</sup> McDowell v. Simpson, 3 Watts (Pa.) 129, 27 Am. Dec. 338; Kozel v. Dearlove, 144 Ill. 23, 32 N. E. Rep. 542, 36 Am. St. Rep. 416; Contra Hammond v. Hannin, 21 Mich. 374, 4 Am. Rep. 490.

an agent shall be binding upon the principal unless such an agent is authorized in writing to make such contract.” The plaintiff brought action upon the contract. The court held that he could not recover.

“Under the statute, as it now reads,” said the court, “requiring written authority for the contract the agent makes, there can be no question, it would seem, that there is no such ratification here as could, by any process of reasoning, bind the defendant, Maull, to specifically perform the contract in question, which his agent, Hieman, had no authority to make.”<sup>7</sup>

**§ 66. Implied ratification.** Implied ratification is based upon acts and circumstances. In the great majority of cases, ratification is inferred from the conduct of the principal. If his conduct is such as reasonably to lead the party who has dealt with the agent to suppose that he intends to abide by the contract he will not afterward be permitted to deny the authority of the agent. In other words, he is estopped to deny the agency.

There are three general forms of implied ratification—by acceptance of benefits; by asserting rights arising from the contract alleged to have been ratified; and by silence after notification of the agent’s act.

**§ 67. By acceptance of benefits.** Whenever a person, with full knowledge of all the facts, accepts the

<sup>7</sup> Hawkins v. McGroarty, 110 Mo. 546, M. 167.

benefits resulting from the act of a person undertaking to act in his behalf, he thereby adopts the other's act in its entirety and assumes the liabilities as well as the advantages resulting therefrom.<sup>8</sup>

For example: L was the agent of H for certain purposes. In January, 1880, L entered into negotiation with C for the leasing to the latter of certain premises belonging to H for a long period. C raised a question as to L's authority to make such a lease and wrote to H, who was abroad at the time. While waiting for H's answer L executed and delivered the lease and C accepted it conditionally, waiting for message from H. H cabled L not to make a lease. H showed the message to C, who refused to permit the lease to be cancelled. H returned and during the period of the lease received the rent without objection. But the lease contained a provision for its extension at the option of the tenant. H refused to renew and this action was brought. The court held that H was liable.

"By accepting and retaining the rent," said the court, "which was the fruit of her agent's act, for nearly five years without objection, she is presumed to have ratified that act. Without expressing any dissatisfaction to the lessees, she received eighteen

<sup>8</sup> *Hyatt v. Clark*, 118 N. Y. 563; *M. 177*, *H. 52*; *Mayer v. Dean*, 115 N. Y. 556, 22 N. E. Rep. 261, 5 L. R. A. 540; *Hitchcock v. Griffin Co.*, 99 Mich. 447, 58 N. W. Rep. 373; *Thomas v. City Nat. Bank*, 40 Neb. 501, 58 N. W. Rep. 943; *Reed v. Morton*, 24 Neb. 760, 40 N. W. Rep. 282, 1 L. R. A. 736; *Strasser v. Conklin*, 54 Wis. 102; *Gunther v. Ullrich*, 82 Wis. 222, 52 N. W. Rep. 88; *Savings Bank v. Butcher Bank*, 107 Mo. 133, 17 S. W. Rep. 644.

quarterly payments of rent before electing to avoid the lease. She made no offer to return any part of the rent so paid, although she tendered back the amount deposited to her credit for the nineteenth quarter at the time that she demanded possession of the premises. \* \* \* We think that after ample opportunity for election and action she ratified the lease and that her ratification was irrevocable.”<sup>9</sup>

**§ 68. By asserting rights arising from the contract.** If a person for whom another has acted without authority asserts any rights which may have arisen from the contract, either against the agent for an accounting of the proceeds, or against the other party, such an act would be an effective ratification of the contract.<sup>10</sup>

For example: The plaintiffs were dealers in musical instruments, with a branch store in W, which was under the sole management of D. D was paid a regular salary and received in addition a commission on all sales made by him for the plaintiff. While acting as such agent, D sold one of plaintiff's pianos to the defendant for \$300, agreeing to accept payment in services of the defendant, who was a stock broker. The defendant earned commis-

<sup>9</sup> Hyatt v. Clark (supra).

<sup>10</sup> Bank of Beloit v. Beale, 34 N. Y. 473; Benson v. Liggett, 78 Ind. 452; Merrill v. Wilson, 66 Mich. 232; Partridge v. White, 59 Me. 564; Frank v. Jenkins, 22 Oh. St. 597; Lyell v. Kennedy, 14. App. Cas. 437.

sions as a stock broker for D to the amount of one hundred and eighty-five dollars, which was credited by D on the piano account, but not paid over to the plaintiffs, nor did the plaintiffs know of the affair. D became a defaulter. Defendant thereafter paid seventy-five dollars on the piano account to the plaintiffs. Plaintiffs bring suit for two hundred and twenty-five dollars. The court held that in suing upon the contract the plaintiffs had impliedly ratified D's agreement to accept defendant's services on account, and that allowance must be made for the services rendered to D.<sup>11</sup>

**§ 69. By silence after notification.** When a person is informed that another has acted for him without authority, he is put to his election either to accept or repudiate the act. If within a reasonable time after learning all the facts he gives notice of his repudiation he will not be liable. But if he does not, within a reasonable time, declare his repudiation of the act, his silence will be deemed conclusive evidence of his approval and adoption of the act.<sup>12</sup>

Example One: The plaintiff had shipped, by the

<sup>11</sup> *Shoninger v. Peabody*, 57 Conn. 42, R. 349.

<sup>12</sup> *Hazard v. Spears*, 4 Keyes (N. Y.) 469, M. 182; *Hamlin v. Sears*, 82 N. Y. 327, M. 136; *Scott v. Railway Co.* 86 N. Y. 200, M. 148; *Philadelphia R. R. Co. v. Cowell*, 28 Pa. St. 329, 70 Am. Dec. 128; *Central R. & B. Co. v. Cheatham*, 85 Ala. 292, 4 So. Rep. 828, 7 Am. St. Rep. 48; *Owlsley v. Woohopter*, 14 Ga. 124; *Hall v. Harper*, 75 Cal. 159, 7 Am. St. Rep. 138; *Greenfield B. v. Crafts*, 4 Allen (Mass.) 447, M. 110; *Brigham v. Peters*, 1 Gray (Mass.) 139.

defendant, certain goods to the East Indies for sale, with directions to invest the proceeds in specified articles. The defendant invested the amount in Benares sugar, which was not one of the specified articles, and informed the plaintiff of the purchase by a letter received by him on the 29th of May. The plaintiff made no objection until the 7th of August, when he notified the defendant's agent that he disowned the purchase. It was held upon suit being brought that the plaintiff had impliedly ratified the defendant's act.

"The principal has no right," said the court, "to pause and await the fluctuation of the market, in order to ascertain whether the purchase is likely to be beneficial. He is bound, if he dissents, to notify of his determination within a reasonable time."<sup>13</sup>

Example Two: A son of the plaintiff, against plaintiff's express commands, exchanged a horse with the defendant and brought the new horse home. The plaintiff said nothing at the time, but used the horse. The parties lived about two miles apart, and the plaintiff, although he saw the defendant riding the horse that the son had traded, made no objection for several weeks. He then endeavored to repudiate the transaction. The court held for the defendant.

"An old and just maxim," said the court, "may well be applied to the plaintiff here, which says, if

<sup>13</sup> Bailey, J., in *Prince v. Clark*, 1 Bar. & C. 185.

he keeps silent when duty requires him to speak, he shall not be allowed to speak when duty requires him to keep silent. His continued silence and long apparent acquiescence, in the act of his son, well justified the defendant in supposing that it met with his entire approval.”<sup>14</sup>

**§ 70. Knowledge of facts essential to ratification.**

As a general rule, ratification must be made by the principal with a full knowledge of all material facts. If, therefore, he ratifies an act under a mistake as to material facts when these facts are suppressed or unknown, the ratification is not binding upon him. Upon being informed of the facts he may disaffirm his ratification, because it was founded upon mistake or fraud.<sup>15</sup>

For example: In August, 1864, the defendants had charge of a fund committed to them by the town of Hawley for the purpose of procuring military recruits for said town to fill its quota in the service of the United States. The plaintiff procured

<sup>14</sup> Hall v. Harper, 17 Ill. 82, R. 359.

<sup>15</sup> Owings v. Hull, 9 Peters (U. S.) 607, 9 L. Ed. 246; Combs v. Scott, 12 Allen (Mass.) 493, M. 146; Thatcher v. Pray, 113 Mass. 291, M. 204; Bierman v. City Mills, 151 N. Y. 482, 45 N. E. Rep. 856, 56 Am. St. Rep. 635; American Exch. B. v. Loretta Mining Co., 165 Ill. 103, 46 N. E. Rep. 202, 56 Am. St. Rep. 233; Cram v. Sickel, 51 Neb. 828, 71 N. W. Rep. 724, 66 Am. St. Rep. 478; Wheeler v. Maguire, 86 Ala. 398, 5 So. Rep. 190, 2 L. R. A. 808; Brown v. Wright, 58 Ark. 20, 22 S. W. Rep. 1022, 21 L. R. A. 467; Bannon v. Warfield, 42 Md. 22; Hardeman v. Ford, 12 Ga. 205; Aetna Ins. Co. v. Iron Co., 21 Wis. 458; Holm v. Bennett, 43 Neb. 808, 62 N. W. Rep. 194.

two recruits and the defendants agreed to pay him \$1,100 for his services. Later they refused to pay on the ground that they had ratified the act under a misapprehension as to the facts. Action was brought and the judge in the lower court instructed the jury that if the defendants' misapprehension of the facts arose from the negligence or omission of the defendants to make inquiries then the plaintiff could recover. But the court held that the defendant was not liable.

Said the court: "Ratification of a past and completed transaction, into which an agent has entered without authority, is a purely voluntary act on the part of the principal. No legal obligation rests upon him to sanction or adopt it. No duty requires him to make inquiries concerning it. Where there is no legal obligation or duty to do an act, there can be no negligence in an omission to perform it.

\* \* \* We do not mean to say that a person may wilfully shut his eyes to means of information within his own possession and control and thereby escape the consequences of ratification."<sup>16</sup>

**§ 71. Implied knowledge of facts.** Ignorance of material facts, however, will not always excuse a principal who seeks to set aside a ratification on the ground of mistake. If the circumstances were such that a reasonably prudent person would have become aware of the facts, then the court will

<sup>16</sup> *Combs v. Scott* (supra).

not allow the ratification to be set aside. In other words, knowledge of the facts will be implied, and the principal will be as fully liable as if he had acted with a complete knowledge of the facts.

For example: The husband of the defendant, acting without authority in her behalf, purchased of the plaintiff certain lands which were conveyed subject to a mortgage "which the grantee hereby agrees to assume and pay, and save the grantors harmless therefrom." The deed was executed and delivered to the defendant's husband, who had it recorded in defendant's behalf. The defendant did not repudiate her husband's act, but instead declared herself the purchaser of the property. It did not appear from the evidence that the defendant had ever seen the deed. Two years after the transaction she attempted to repudiate it and this suit was brought. The court held that the defendant was liable.

"It is one of the facts found at the trial," said the court, "that she knew that the property had been conveyed to herself by deed duly recorded, and that inasmuch as she did not make the bargain herself, she knew that it had been made in her behalf by some person or agent. \* \* \* The fact that the property had been conveyed to her was brought to her knowledge more than two years before there was any disavowal on her part. It is impossible to say, upon these facts, that there was no evidence

which would authorize the judge to find that the defendant ratified and accepted the deed.”<sup>17</sup>

**§ 72. Effect of ratification.** If the principal, acting upon actual or implied knowledge of all material facts, ratifies the unauthorized act of his agent, the ratification is irrevocable, and renders the act itself as binding upon the principal as though the agent had possessed full authority at the time of the act.<sup>18</sup>

Ratification relates back to the time of the performance of the act in question, but it cannot operate to defeat the rights of third parties arising between the time of the act and its subsequent ratification.<sup>19</sup>

For example: S appointed R his agent to collect certain accounts. In excess of his authority, R transferred the accounts to W. W notified the debtors of S of the assignment, and among others one John S. Smith. Shortly after, McCain, a creditor of S, attached by garnishment or trustee process Smith's debt to S. Later S ratified the unauthorized assignment of the accounts to W. Smith, being uncertain whether to pay McCain or W, required them to establish their respective rights in court. The

<sup>17</sup> Coolidge v. Smith, 129 Mass. 154; Kelley v. Railroad Co., 141 Mass. 496, 6 N. E. Rep. 745.

<sup>18</sup> Fletcher v. Bank of U. S., 8 Wheat. 338; Jones v. Atkinson, 68 Ala. 167; Brock v. Jones, 16 Tex. 461.

<sup>19</sup> Wood v. McCain, 7 Ala. 800, H. 122; Cook v. Tullis, 18 Wall. (U. S.) 332, M. 160; McCraeken v. San Francisco, 16 Cal. 519, M. 109; Taylor v. Robinson, 14 Cal. 396; Bird v. Brown, 4 Exch. 786.

court held that McCain was entitled to the money and that the ratification was inoperative as against McCain's attachment.

Said the court: "Although the general rule is that the ratification relates back to the time of the inception of the transaction, and has a complete retroactive efficacy, or as the maxim is, *omnis ratihabitio retrotra hitur*, yet this doctrine is not universally applicable. Thus, if third persons acquire rights, after the act is done and before it has received the sanction of the principal, the ratification cannot operate retrospectively so as to overreach and defeat those rights. \* \* \* Previous to its ratification, the plaintiff below acquired a lien upon the debt owing by the garnishee, which could not have been defeated at the mere volition of the defendant in the judgment." <sup>20</sup>

**§ 73. What acts may be ratified.** Any act that a principal may authorize an agent to do by authority prior to the act, may be ratified after the act, provided the principal could himself lawfully perform the act or delegate it to others at the time of the ratification.<sup>21</sup>

**§ 74. Ratification of a forgery.** Although illegal acts cannot be ratified, yet the question of whether

<sup>20</sup> Wood v. McCain (supra).

<sup>21</sup> McCracken v. City of San Francisco, 16 Cal. 591; City of Findlay v. Pertz, 66 Fed. Rep. 427; Dempsey v. Chambers, 154 Mass. 330.

a person may ratify a forgery has given the courts much trouble. Of course, the liability of the guilty party for his crime cannot be removed by the ratification, but if the act itself is regarded in its civil aspect there seems no valid reason why the person whose name has been used cannot treat the forgery as a mere unauthorized act and ratify it as such.<sup>22</sup>

For example: Action was brought upon a note bearing the name of Thomas Crafts as joint maker with Martin Crafts, and three drafts drawn by Martin Crafts and bearing the name of Thomas Crafts as indorser. The signatures of Thomas Crafts were forgeries. The plaintiff claims, however, that Thomas Crafts had ratified the signatures. Martin was the son of Thomas and had forged his father's name on other occasions, and Thomas had not disclaimed liability. When claim was made upon him he had stated that he knew the paper was overdue and ought to have been attended to, and furthermore that it should be settled, for he had property enough to satisfy the claims. The court held that Thomas Crafts was liable.

“It is, as it seems to us,” said the court, “equally competent for the party, he knowing all the circumstances as to the signature and intending to

<sup>22</sup> *Greenfield Bank v. Crafts*, 4 Allen (Mass.) 447, M. 110; *Wellington v. Jackson*, 121 Mass. 157; *Montgomery v. Crossthwait*, 90 Ala. 553, 8 So. Rep. 498, 12 L. R. A. 140; *Henry v. Heeb*, 114 Ind. 275, 5 Am. St. Rep. 613, M. 115; *Hefner v. Vandolah*, 62 Ill. 483, 14 Am. Rep. 106; *Cravens v. Gillelan*, 63 Mo. 28; *Commercial Bank v. Warren*, 15 N. Y. 577.

adopt the note, to ratify the same, and thus confirm what was originally an unauthorized and illegal act. \* \* \* It is, however, urged that public policy forbids sanctioning a ratification of a forged note, as it may have a tendency to stifle a prosecution for the criminal offense. It would seem, however, that this must stand upon the general principles applicable to other contracts, and is only to be defeated where the agreement was upon the understanding that if the signature was adopted the guilty party was not to be prosecuted for the criminal offense.''<sup>23</sup>

**§ 75. An act cannot be ratified in part.** A principal is put to his election to ratify or repudiate the entire unauthorized act. He cannot ratify a part of the act and repudiate the remainder, for if he were allowed to do this it would result in injustice to the other party. The burdens as well as the benefits must be assumed or rejected as an inseparable whole.<sup>24</sup>

For example: The plaintiff's agent was authorized to sell a wagon for \$75 cash, but he disobeyed instructions and sold it on the following terms: \$5

<sup>23</sup> *Greenfield Bank v. Crafts* (supra).

<sup>24</sup> *Wheeler v. Sleight Co.*, 39 Fed. Rep. 347, M. 138; *Baldwin v. Burrows*, 47 N. Y. 199, M. 196; *Smith v. Tracy*, 36 N. Y. 79, M. 154; *Eberts v. Selover*, 44 Mich. 519, 38 Am. Rep. 278, M. 150; *Bush v. Wilcox*, 82 Mich. 336, 47 N. W. Rep. 328; *Roberts v. Rumley*, 58 Iowa, 301, M. 143; *Daniels v. Brodie*, 54 Ark. 216, 15 S. W. Rep. 467, 11 L. R. A. 81; *Wheeler & Wilson Mfg. Co. v. Aughey*, 144 Pa. St. 398, 22 Atl. Rep. 667, H. 84, M. 152; *McClure v. Briggs*, 58 Vt. 82.

in money, an old wagon, and a non-negotiable note payable to himself for \$57.50. Plaintiff brought suit for the value of the wagon. The judge in the lower court instructed the jury to return a verdict for the plaintiff for the amount of the note. This was done and the defendant alleged exceptions. The Supreme Court held for the defendant.

“It seems to us very clear,” said the court, “that if the plaintiff’s property was sold by a person assuming to act for him, but without authority, in an action against the purchaser, if the plaintiff waives the tort and ratifies the contract, he must ratify it as the agent has made it. Otherwise, he can only sue for the property itself, or in tort for damages for unlawful conversion. He cannot ratify a part of the contract made on his behalf and repudiate the rest.”<sup>25</sup>

**§ 76. What acts are incapable of ratification.** A contract, void because of illegality, cannot be ratified, even though the law rendering the contract void has been repealed.<sup>26</sup> Of course, if the law rendering the contract illegal is still in force no ratification is possible.<sup>27</sup>

**§ 77. Who may ratify.** As a general proposition, all persons who are legally competent to authorize

<sup>25</sup> *Brigham v. Palmer*, 3 Allen (Mass.) 450.

<sup>26</sup> *Spence v. Cotton Mills*, 115 N. C. 210, 20 S. E. Rep. 372.

<sup>27</sup> *Zottman v. City of San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *Jefferson County Sup’rs v. Arrighi*, 54 Miss. 668.

an agent to act for them may ratify an unauthorized act of another in their behalf. But something more than legal capacity must be shown in order to entitle a person to exercise the power to ratify an act. It must be shown (1st) that the principal was an existing person capable of being ascertained at the time of the performance of the act; (2nd) that the contract was made in the name of and in the behalf of such principal.

**§ 78. Principal must be an existing person.** In order for ratification to be possible it must appear that the person who now seeks to ratify the act was in actual existence at the time of the act in question. Cases involving this proposition most frequently arise through contracts made by promoters of a corporation not yet in existence in behalf of the corporation which is to be formed. The courts hold that the corporation when it is formed cannot ratify the contracts in question.<sup>28</sup>

It should be noted, however, that a corporation so formed may adopt a contract made in its behalf before its formation, or be held liable for benefits accepted as the result of such contract,<sup>29</sup> so it

<sup>28</sup> *Kelner v. Baxter*, L. R. 2 C. P. 174; *Abbott v. Hapgood*, 150 Mass. 248.

<sup>29</sup> *McArthur v. Times Printing Co.*, 48 Minn. 319; *Paxton v. Cattle Co.*, 21 Neb. 621; *Rockford, etc., R. R. v. Sage*, 65 Ill. 328; *Bell's Gap R. R. v. Christy*, 79 Pa. St. 54.

amounts to nearly the same thing, and some courts treat it as ratification.<sup>30</sup>

**§ 79. Contract must be made in behalf of principal.** Although, as it will be seen hereafter, a principal who has duly authorized an agent to act for him may claim the benefits of a contract even though the agent has acted without disclosing his agency; yet this is not true of one who seeks to ratify an unauthorized act. He, in order to ratify, must show that the act to be ratified was done in his name and in his behalf. If, therefore, the act in question was done in the name of the doer without disclosing his pretended agency, or the name of the alleged principal, there can be no ratification.<sup>31</sup>

For example: The plaintiff made a contract with certain members of the board of directors of the town of R to sell to them certain school books. The directors acted without authority, and the wording of the contract was such as to impose a personal liability upon them. It was alleged that the town of R ratified the act of its directors. The plaintiff sues the town for failure to accept and pay for the books. The court held that the town was not liable. Said the court:

“The plaintiff, while inferentially concealing that

<sup>30</sup> Whitney v. Wyman, 101 U. S. 392; Oakes v. Cattaraugus Water Co., 143 N. Y. 430.

<sup>31</sup> Grund v. Van Vleck, 69 Ill. 478; Western Pub. House v. Dist. Tp. of Rock, 84 Iowa 101; Herd v. Bank of Buffalo, 66 Mo. App. 643; Hamlin v. Sears, 82 N. Y. 327.

the contract was made without authority, insists that it was afterward ratified. But as the contract did not purport to bind the defendant, it could not ratify it. There is no such thing as the ratification of a contract by an obligor made by another, when it does not purport to bind him but binds the other. In such a case the obligor cannot become bound by a ratification. He can only become bound by a new contract assuming or adopting the obligation of the prior one.”<sup>32</sup>

<sup>32</sup> Western Pub. House v. Dist. Twp. of Rock (*supra*).

## CHAPTER VII

### MODES OF CREATING AGENCY—Continued

- § 80. Agency by estoppel.
- § 81.     Methods of establishing.
- § 82.     Representations or conduct of principal.
- § 83. Agency by necessity.
- § 84.     Agency of wife.
- § 85.     Agency of child.
- § 86.     Agency of shipmaster.
- § 87.     Agency of railway employer to engage surgeon.

**§ 80. Agency by estoppel.** We have previously considered agency arising from the consent of the principal as manifested either by authorization of the agent prior to the act, or by ratification of the act after it has been performed. We have now to consider a kind of agency that arises not from the consent of the principal, but which is created by law to protect innocent parties who have been induced to enter into a contract with a person whom the principal has held out or knowingly allowed to pose as his agent in the transaction in question. This is known as agency by estoppel *in pais*.<sup>1</sup>

**§ 81. Method of establishing agency by estoppel.** In establishing an agency by estoppel the person

<sup>1</sup> Breckenridge v. Lewis, 84 Me. 349, 30 Am. St. Rep. 353, M. 103.

aggrieved must be able to prove: (1) That the principal himself has held out the party as his agent, or has knowingly permitted him to so represent himself. (2) That the plaintiff himself acted reasonably in believing that a *bona fide* agency existed. (3) That a legal relation has been entered into between the plaintiff and the alleged agent, which, if the principal were allowed to repudiate it, would result in damage to the plaintiff.

If these three things can be established to the satisfaction of the court, the principal will not be allowed to deny the agency, or, in other words, he is estopped to contradict previous statements or conduct.

**§ 82. Representations or conduct of principal.** As already indicated, it is necessary to prove that the principal himself is at fault in the matter. If the principal has himself knowingly fostered the impression that the alleged agent is in reality his agent, proof of these facts should in justice render him liable for conduct of the agent in the capacity indicated. Similarly, if he has, without protest, permitted the agent to represent himself as his agent under circumstances which would call for a denial if the claim were untrue, he is liable for results flowing from the alleged agency. If, however, the agent has, without the principal's apparent sanction, falsely represented himself as his agent,

the principal is at liberty to deny the agency and cannot, therefore, be held.<sup>2</sup>

Example One: Action was brought upon a promissory note alleged to have been signed by the defendant. The facts were that the defendant had signed her name on a blank paper to enable M to write an order on a savings bank where the defendant had funds. M had charge of certain business for the defendant, and the need of money in connection with the business was the reason for her conduct. M had fraudulently written the note in question over the defendant's signature. The court held that the defendant was liable.

"The defendant may be held under the plain rules of agency," said the court. "By intrusting her signature to her agent for use, the defendant gave him an apparent authority to use it in the manner he did.

\* \* \* It was apparently the defendant's genuine promise, and she, by intrusting her name to her agent for commercial purposes, held him out as an agent with general powers in relation to it. She clothed him with apparent authority and cannot now deny it to the loss of any person who innocently relied upon it."<sup>3</sup>

Example Two: S stood by and permitted his wife

<sup>2</sup> Martin v. Webb, 110 U. S. 7; Traveller's Ins. Co. v. Edwards, 122 U. S. 457; Union Stock Yards v. Mallory, 157 Ill. 554, 41 N. E. Rep. 888; Pussley v. Morrison, 7 Ind. 356, 63 Am. Dec. 424; Simon v. Brown, 38 Mich. 552; Johnson v. Hurley, 115 Mo. 513, M. 84; Savings Soc. v. Savings Bank, 36 Pa. St. 498, 78 Am. Dec. 390, M. 371; Tier v. Lampson, 35 Vt. 179, 82 Am. Dec. 634.

<sup>3</sup> Breckenridge v. Lewis, 84 Me. 349, 30 Am. St. Rep. 353, M. 103.

to mortgage certain property belonging to him. Later a creditor of the husband levied upon the property and the mortgagee brought an action of conversion against the officer. The question arose whether the mortgage was valid, since the wife had no actual authority as agent of her husband. The court held that this was a case of agency by estoppel and hence that the plaintiff could recover.<sup>4</sup>

Example Three: For a long time prior to 1863 B was the agent of the defendants in selling stoves. This fact was generally known and was well known to the plaintiff. In 1863 B ceased to be the agent of the defendant, but continued to sell stoves, which he purchased of the defendants. No public notice of the termination of the agency was given, nor was the fact known to the plaintiff. B continued to represent himself as agent of the defendants and was in the habit of taking notes for stoves sold, payable to the defendants, and this was known to the defendants. The plaintiff, believing B to be the agent of the defendant, offered to buy a stove of him and pay him in pine lumber. To this B assented and the lumber was accordingly furnished to B and the defendants, together with other lumber which the plaintiff charged up to the defendants. The defendants later attempted to escape liability for the lumber furnished in excess of the value of the stove, but the court held that they were liable.<sup>5</sup>

<sup>4</sup> Edgerton v. Thomas, 9 N. Y. 40, H. 127.

<sup>5</sup> Bradish v. Belknap, 41 Vt. 172, H. 172.

§ 83. **Agency by necessity.** Agency by necessity is a relation created by law without reference to the actual or implied consent of the principal, nor yet based upon the principle of estoppel. Whenever the law imposes upon a person a positive duty to do an act it will hold him liable for that act, even though he did not personally order it to be performed.

§ 84. **Agency of wife.** The law imposes upon a husband the duty to support his wife and to supply her with necessities of life. The question of what are necessities would of course depend upon the husband's own station in life. What would be deemed necessities to the wife of a millionaire might well be considered luxuries to the wife of a mechanic. But if it can fairly be said that the articles purchased by the wife are under the circumstances necessities which the husband has refused to provide, the husband is liable therefor, whether he is aware of the purchase or not, and even though he has forbidden the other party to deal with his wife.<sup>6</sup>

Example One: The defendant's wife was living apart from him because of his cruelty. She was without means of support. The plaintiff supplied milk to the wife at her request and charged it to the defendant. The court held that the defendant was liable.<sup>7</sup>

<sup>6</sup> Benjamin v. Dockham, 134 Mass. 418, H. 147; Woodward v. Barnes, 48 Vt. 330; East v. King, 77 Miss. 738, 27 So. Rep. 608; Berg v. Warner, 47 Minn. 250, H. 147; Johnson v. Sumner, 3 H. & N. 261.

<sup>7</sup> Benjamin v. Dockham (supra).

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Example Two: The defendant's wife purchased on credit of the plaintiff a pair of diamond earrings for her own use. She was living with her husband at the time. It appeared that the defendant was well-to-do; that he furnished her with expensive wearing apparel, and supplied her with a monthly allowance of "pin money." The plaintiff seeks to hold the defendant on the ground that the articles in question were necessities. The court held for the defendant.

"In this case," said the court, "the plaintiff utterly failed to establish a right to recover for the articles sued for in the first cause of action as 'necessaries.' Conceding, for the sake of argument, that in view of the estate and rank of the defendant, the trial judge would have been justified in finding as a fact that the diamond earrings were necessities, yet, so far as there being any evidence that the defendant neglected or refused to provide his wife a suitable support, it affirmatively appeared that he provided for her amply, and even liberally."<sup>8</sup>

**§ 85. Agency of child.** The courts are not in harmony on the question of whether a father is under a legal obligation to support his child. Many jurisdictions hold that no such obligation exists,<sup>9</sup> but there

<sup>8</sup> *Bergh v. Warner* (supra).

<sup>9</sup> *Mortimer v. Wright*, 6 M. & W. 482; *Carney v. Barrett*, 4 Ore. 171; *McMillen v. Lee*, 78 Ill. 443; *Rogers v. Turner*, 59 Mo. 116; *Freeman v. Robinson*, 38 N. J. L. 383, 20 Am. Rep. 399; *Van Val-*

are some jurisdictions that declare that a father is under a legal duty to support his infant children. In the latter jurisdictions it is accordingly held that if a father fails to supply his minor child with necessities of life, the child may pledge the father's credit to secure them.<sup>10</sup>

**§ 86. Agency of shipmaster.** It is generally held that, in cases of extreme emergency, a shipmaster may borrow money on the credit of the shipowner,<sup>11</sup> or dispose of a part or all of the cargo.<sup>12</sup> In order to justify such action, however, the master must show that he was unable to communicate with the shipowner and that there was apparently no other way out of the difficulty.

**§ 87. Agency of railway employee to engage surgeon.** It is held in some jurisdictions that in case of railway accidents resulting in serious bodily injury to employees, the highest official of the company who chances to be at hand is vested with au-

kinburgr v. Watson, 13 Johns. (N. Y.) 480, 7 Am. Dec. 395; Gordon v. Potter, 17 Vt. 348; Kelley v. Davis, 49 N. H. 187, 6 Am. Rep. 499.

<sup>10</sup> Gilley v. Gilley, 79 Me. 292, 9 Atl. Rep. 623; 1 Am. St. Rep. 307; Cromwell v. Benjamin, 41 Barb. (N. Y.) 558; Stanton v. Wilson, 3 Day (Conn.) 37, 3 Am. Dec. 255; Watkins v. De Armond, 89 Ind. 553. See dictum in Dennis v. Clark, 2 Cush. (Mass.) 347, 48 Am. Dec. 671.

<sup>11</sup> Stearns v. Doe, 12 Gray (Mass.) 482, 74 Am. Dec. 608; Macready v. Thorn, 51 N. Y. 454.

<sup>12</sup> United Ins. Co. v. Scott, 1 Johns. (N. Y.) 106; Pratt v. Read, 19 How. (U. S.) 359, 15 L. Ed. 660; Gordon v. Ins. Co., 2 Pick. (Mass.) 249; Pike v. Balch, 38 Me. 302, 61 Am. Dec. 248.

thority to pledge the company's credit to employ a surgeon to attend the injured employee.<sup>13</sup> This authority arises from the necessity of the moment and terminates when the emergency has passed.

For example: V was in the employ of the defendant railroad in the capacity of brakeman on one of its freight trains. On the morning of July 11, 1885, while performing his customary duties V's leg was broken. The conductor called a skilful surgeon of the town where the injury occurred to care for the injured man. He set, dressed and bandaged the broken limb. The conductor then summoned other surgeons by telegraph and the plaintiff responded and treated the patient in conjunction with the surgeon first engaged. The plaintiff now seeks to recover from the railroad company for services rendered. The court held for the defendant.

"The appellant," said the court, "had discharged its duty to its injured brakeman when it procured the services of a competent surgeon. The conductor had no authority to employ other surgeons, for his authority was special, not general, and it did not extend beyond the duty created by the emergency

<sup>13</sup> *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358, 49 Am. Rep. 752, H. 152; *Arkansas & S. R. Co. v. Loughridge*, 65 Ark. 907, 45 S. W. Rep. 907; *Evansville R. R. Co. v. Freeland*, 4 Ind. App. 207, 30 N. E. Rep. 803; *Cincinnati, I. & St. L. & C. R. Co. v. Davis*, 126 Ind. 99, 25 N. E. Rep. 878, 9 L. R. A. 503; *Atlantic & P. R. Co. v. Reisner*, 18 Kan. 458; *Atchison & N. R. Co. v. Reeher*, 24 Kan. 228; *Bingham v. Railway Co.*, 79 Iowa 534, 44 N. W. 805; *contra Tucker v. Railway Co.*, 54 Mo. 177; *Brown v. Railway Co.*, 67 Mo. 122; *Mayberry v. Railroad Co.*, 75 Mo. 492.

which required him to act. With that duty his authority arose, and with it terminated. He had authority to do what the emergency demanded, in order to preserve his injured fellow employee from serious harm, but he had no authority to do more.”<sup>14</sup>

<sup>14</sup> Louisville, etc., Ry. v. Smith, 121 Ind. 353, H. 158.

## CHAPTER VIII

### DELEGATION OF AUTHORITY

§ 88. Delegation in general.

§ 89. Express authority to appoint sub agents.

§ 90. Implied authority to appoint sub agents.

§ 91. Responsibility for acts of sub agents.

**§ 88. Delegation in general.** The question now to be considered is whether an agent who has due authority to act for his principal in a given capacity has authority to delegate his power, or a portion thereof, to sub-agents, who are to exercise it for, or under him, in his principal's behalf.

A principal has the unquestioned right to select his own agents, and unless he has expressly or impliedly authorized a given agent to appoint deputies or sub-agents, the agent has no authority to make such appointments.<sup>1</sup> This principle of law is well

<sup>1</sup> "If a man is to be held liable for the acts of his servants, he certainly should have the exclusive right to determine who they shall be. Hence, we think, in every well-considered case where a person has been held liable, under the doctrine referred to (that the principal is liable for the acts of his agents), for the negligence of another, that other was engaged either by the defendant personally or by others by his authority, express or implied." Mitchell, J., in *Haluptzok v. Railway Co.*, 55 Minn. 446, 57 N. W. Rep. 144, 26 L. R. A. 739; *McKinnon v. Vollmar*, 75 Wis. 82, 43 N. W. Rep. 800; *Central, etc., Ry. Co. v. Price*, 106 Ga. 176, 71 Am. St. Rep. 246; *Birdsall v. Clark*, 73 N. Y. 73, 29 Am. Rep. 105, M. 231; *Davis v.*

expressed in the Latin maxim: *Delegata potestas non potest delegari* (delegated authority cannot be delegated).

**§ 89. Express authority to appoint sub-agents.**

The question of whether the principal has given the agent express authority to appoint sub-agents should present little difficulty. Such authority, if at all, must appear from the language of the principal in appointing the agent, or in outlining his duties under the appointment.

**§ 90. Implied authority to appoint sub-agents.**

An agent possesses implied authority to appoint a sub-agent whenever it can fairly be said that in view of the character of the transaction, or the custom or usage in that particular business, the principal must have intended to confer such authority. This rule is based upon the well known principle of law, that an appointment of an agent to perform a certain duty carries with it implied authority to do all things necessary to accomplish the purpose of the agency. The law imputes to a person the forethought that the ordinary man should possess and, although he may not actually have foreseen a necessity that subsequently arises, he will be presumed to have foreseen it at the time of the appointment if the ordinary man would have done so.<sup>2</sup>

King, 66 Conn. 465, 50 Am. St. Rep. 104; Appleton Bank v. McGilvray, 4 Gray (Mass.) 518, 64 Am. Dec. 92, M. 229.

<sup>2</sup> Day v. Noble, 2 Pick. (Mass.) 615; Dorchester & M. Bk. v. N. E.

Example One: A at Salem, Mass., delivered two boxes of marble and one box of granite to B to be transported by him by water to Norfolk, Va., and there sold. A gave B the following instructions: "You will dispose of the above articles for the most you can obtain, and invest the proceeds in flour; if not convenient, you will make returns in cash." B arrived at Norfolk and remained there 17 or 18 days and tried to sell the articles there, but could not effect a sale. He then went to Alexandria and stayed about a week, but could not sell there. After that he went to Georgetown and remained a week, advertising the articles for sale in the newspapers of the locality, but without result. He then left the articles with K, a reputable merchant with whom he did business, to be sold for A. A thereafter sued B for breach of duty in disposing of the articles as he had. The court held that B had implied authority to delegate to K his duty of disposing of the articles and was not liable.<sup>3</sup>

Example Two: The plaintiff in Boston deposited with the defendant bank certain drafts payable in Washington, D. C. The defendant having no correspondent in Washington transferred the drafts to the C Bank of Boston, a reputable bank, which

Bk., 1 Cush. (Mass.) 177; *Harralson v. Stein*, 50 Ala. 347, M. 236; *Grady v. Ins. Co.*, 60 Mo. 116, M. 238; *Exchange Nat. Bk. v. National Bk.*, 112 U. S. 276, M. 239; *Cummings v. Heald*, 24 Kan. 600, 36 Am. Rep. 264, M. 247; *McKinnon v. Vollmar*, 75 Wis. 82, 43 N. W. Rep. 800, 6 L. R. A. 121.

<sup>3</sup> *Day v. Noble* (supra).

in turn transferred the drafts to the Bank of M in Washington. The drafts were collected, but the C Bank having failed, the Bank of M applied the proceeds to a balance due it from the C Bank. The defendant bank made unsuccessful efforts to recover the proceeds from the Bank of M. The plaintiff now sues the defendant bank for the loss occasioned by the act of its sub-agent. The court held that the defendant was not liable. Said the court: "When from the nature of the agency a sub-agent or sub-agents must necessarily be employed, the assent of the principal is implied. Such was the nature of the agency in the present case. It could not have been expected that the defendants would employ one of their own officers to proceed to Washington to obtain payment of the bills. The bills undoubtedly were intended to be transmitted to Washington for collection, and of the defendants employed suitable sub-agents for that purpose, in good faith, they are not liable for the neglect or default of the sub-agents. \* \* \* The Commonwealth Bank, at that time, was in perfectly good credit, and had great facilities for obtaining payment of bills and notes payable in distant states." <sup>4</sup>

<sup>4</sup> *Dorchester & M. Bk. v. N. E. Bk.* (supra). Some courts, however, hold that the bank with whom the deposit is made is a principal and as such liable for the acts of its sub-agents. *Exchange Nat. B. v. Third Nat. B.*, 112 U. S. 276. This rule prevails in New York, Michigan, Minnesota, New Jersey, Ohio, Montana, Colorado and Indiana.

**§ 91. Responsibility for acts of sub-agents.** If an agent, with actual or implied authority to appoint sub-agents, does so in good faith, and in the exercise of due care, he is not liable for the acts of such sub-agents. In other words, the sub-agents become as fully the agents of the principal as is the original agent.<sup>5</sup> If, however, the agent has no actual or implied authority to appoint sub-agents he will be held liable for the misconduct of his assistants.<sup>6</sup>

For example: The plaintiff owned land in Illinois. The defendant was a dealer in real estate who lived about fifteen miles distant from the land in question. The plaintiff employed the defendant to sell the land. The defendant requested O, who frequently assisted them in the sales of land, to try to find a purchaser. O, having found a purchaser for \$22.75 per acre, informed the defendants that he had received an offer of \$10 per acre. The defendants reported this offer to the plaintiff and expressed in good faith a belief that \$10 per acre was a fair price. The land was sold and O retained \$2,040 of the purchase price, paying over to the defendants \$1,600 (the price of the land at \$10 an acre), which they transmitted to the plaintiff after deducting their commission. The plaintiff now discovers O's fraud

<sup>5</sup> *Franklin Fire Ins. Co. v. Bradford*, 201 Pa. St. 32, 50 Atl. Rep. 286, 55 L. R. A. 408; *Davis v. King*, 66 Conn. 465, 50 Am. St. Rep. 104 and note.

<sup>6</sup> *Barnard v. Coffin*, 141 Mass. 37, 55 Am. Rep. 443, M. 249; *Hoag v. Graves*, 81 Mich. 628, 46 N. W. Rep. 109.

and brings suit for damages against the defendant. The court held that the plaintiff could recover.

“The principle that runs through the cases,” said the court, “is that if an agent employs a sub-agent for his principal, and by his authority, express or implied, then the sub-agent is the agent of the principal, and is directly responsible to the plaintiff for his conduct; so far as damage results from the conduct of the sub-agent, the agent is only responsible for want of due care in selecting the sub-agent; but if the agent, having undertaken to do the business of his principal, employs a servant or agent, on his own account, to assist him in what he has undertaken, such a sub-agent is an agent of the agent, and is responsible to the agent for his conduct, and the agent is responsible to the principal for the manner in which the business has been done, whether by himself or by his servant or agent.”<sup>7</sup>

<sup>7</sup> Barnard v. Coffin (*supra*).

## CHAPTER IX

### NATURE AND EXTENT OF AUTHORITY

- § 92. In general.
- § 93. Actual authority.
- § 94.       Special agents.
- § 95.       General agents.
- § 96. Apparent authority.
- § 97.       Where agent has no real authority.
- § 98.       Where agent exceeds his real authority.
- § 99. Distinction between actual and apparent authority.
- § 100. Apparent authority—Illustrations of powers commonly included.

§ 92. **In general.** As a general proposition of law a principal is liable to third persons for all acts of his agents or servants within the scope of their actual or their implied authority. The terms actual authority and implied authority differ greatly in many respects. So far as the mutual rights of principal and agent are concerned, liability of one to the other is practically confined to acts performed by the agent within the scope of his actual authority. The agent is, or should be, aware of the extent of his actual authority and can acquire no rights against his principal for unratified acts outside of the scope of such authority.

With the public, however, who are unaware of the actual limitations of the agent's authority and

have no means of ascertaining the true state of affairs, apparent authority of the agent is the determining factor. If apparent authority of the agent can be established, the principal will be liable, whether or not the act were actually authorized. Obviously the term "apparent authority" may include far more than "actual authority." We have now to consider each in detail.

§ 93. **Actual authority.** Actual authority, as the words imply, is that authority conferred upon the agent definitely and positively by written or spoken words. A power of attorney is a familiar example of actual authority, and if the existence of the document is known to the party dealing with the agent, or if the act performed is of such a nature that the agent must of necessity be acting under a power of attorney or other written authority, the liability of the principal is limited strictly to the provisions of the instrument, that is, to the agent's actual authority.<sup>1</sup>

For example: H, who resided in Massachusetts, wrote to his brother M in Illinois, authorizing him to sell certain prairie land for \$225, and timber land for \$25, authorizing him to retain all he could get over that price for his trouble and adding the following sentence: "I shall want all the money I can

<sup>1</sup> Stewart v. Pickering, 73 Ia. 652, R. 90; Peabody v. Hoard, 46 Ill. 242, R. 88; Craighead v. Peterson, 72 N. Y. 279; Gilbert v. How, 45 Minn. 121; Hurley v. Watson, 68 Mich. 531; Stainback v. Read, 11 Gratt. (Va.) 281, 62 Am. Dec. 648.

scrape together to pay my way through.” M owned certain adjoining land which he desired to sell. S agreed to purchase M’s land provided he could also procure H’s land. M, assuming to act as attorney for his brother, sold his land and took in payment not money but jewelry. The purchaser’s title was later questioned and the court declared it void.

“Smith was bound at his peril,” said the court, “to see the authority of the agent before he purchased, and in this case did see it, and not only so, but took legal advice upon it, and was informed that it was insufficient; that if he purchased he would have to run the risk of getting it confirmed by the owner. \* \* \* In this case the latter only authorized a sale for money. It speaks of so many dollars as the price for which the sale could be made. \* \* \* There is no pretense that either Smith or M could have understood that the sale could be made for watches. Yet it seems it was.”<sup>2</sup>

**§ 94. Actual authority—Special agents.** As we have seen in another connection<sup>3</sup> a special agent is one who is authorized to perform a certain specified act or series of acts. His powers are definitely set forth by the principal in spoken or written words. This is the simplest form of actual authority. Any person who deals with a special agent, with actual or implied knowledge of the fact that he is a special

<sup>2</sup> Peabody v. Hoard (supra).

<sup>3</sup> See Sec. 12.

agent, is bound to take notice of the limitations of his authority. This does not mean that mere inquiry directed to the agent himself is *sufficient—the agent's statements as to his authority or to the extent of it cannot be relied upon*. The actual evidences of his authority must be consulted. If there is written authority, the writing should be examined; for the principal cannot be held for anything except what is contained in the instrument, as has already been observed in the case of *Peabody v. Heard*, the facts of which were given in the preceding section.

**§ 95. Actual authority—General agents.** Since a general agent is one who is appointed to conduct a particular branch, or various branches, of his principal's business, it follows that his duties may be definitely outlined for him. It would be too much to expect, however, that his principal's instructions could be so complete as to cover all contingencies. Some discretion must be allowed the agent. It is usually declared by the courts that such an appointment carries with it whatever incidental powers may be necessary to a full execution of the purposes of the agency.<sup>4</sup>

For example: *Otis* was employed by the defendants as a traveling salesman, in the sale of mer-

<sup>4</sup> *Bentley v. Doggett*, 51 Wis. 224, W. 345, H. 315; *Wheeler v. McGuire*, 86 Ala. 398, M. 362; *Huntley v. Mathias*, 90 N. C. 101; *Pole v. Leask*, 28 Beav. 562; *Durrell v. Evans*, 1 H. & C. 174.

chandise, samples of which he was obliged to carry with him in trunks. This rendered necessary the employment of horses and carriages. The plaintiff sues the defendant for livery furnished to Otis in connection with the defendant's business. The defendant sets up in defense that Otis was regularly furnished with money for traveling expenses, and that he had already been paid the amount of plaintiff's bill on the supposition that he had himself settled with the plaintiff. The court held that since the plaintiff had acted in good faith without knowledge of Otis' cash allowance for expenses he could recover against the defendant, the use of horses and carriages being one of the incidental powers necessary to the accomplishment of the agent's duty.<sup>5</sup>

**§ 96. Apparent authority.** We have seen under the preceding section that even under the doctrine of actual authority the agent possesses whatever incidental powers are necessary to the execution of his duty. The law wisely declares that such incidental powers are a part of the agent's actual authority, whether the principal really intended to confer them or not; in other words, that the principal shall be held responsible for a reasonable interpretation of the powers conferred upon his agent.

The doctrine of "apparent authority" carries this idea into a broader field, and declares that whenever a principal has so acted with reference to

<sup>5</sup> Bentley v. Doggett (*supra*).

another as to lead the public to suppose that that other is his agent he will not be allowed to deny the agency, if third persons have in good faith dealt with the apparent agent in the principal's behalf. The justice of this rule will become more manifest when we consider the ways in which apparent authority of the agent may arise.

**§ 97. Apparent authority—Where agent has no real authority.** Even though the agent has no real authority to act for his supposed principal, yet if the principal knowingly allows conditions to exist which indicate to others that an agency has been established, or if he ratifies unauthorized acts without repudiating the agent's continued authority, he will be held liable to persons who deal with the agent relying upon his supposed authority. The familiar doctrine of estoppel prevents the principal from denying the authority of one whom he has held out as his agent.<sup>6</sup>

**Example One:** A knows that B, without authority, is collecting money on his accounts, but takes no measures to prevent his doing so. B, later, instead of paying over the money so collected, absconds. A cannot collect from debtors who have already settled with B.

**Example Two:** Plaintiff brings action against the

<sup>6</sup> *Bryan v. Jackson*, 4 Conn. 288, R. 97; *Graves v. Horton*, 38 Minn. 66, R. 95; *Columbia Mill Co. v. National Bank*, 52 Minn. 224, H. 130; *Crane v. Gruenwald*, 120 N. Y. 274, H. 139.

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defendant for articles delivered to the defendant's son Oliver, a minor, who was at the time a student in Yale College. It appeared that the plaintiff had previously furnished similar articles to Oliver and that the defendant had paid the bill without objecting to the account, although he had privately given Oliver positive orders not to incur further debts. The court held that the defendant was liable.<sup>7</sup>

**§ 98. Apparent authority—Where agent exceeds his real authority.** If a principal appoints an agent to act for him in a capacity which by custom involves certain powers he cannot by secret instructions divest him of that authority so far as the general public is concerned. Every person who deals with the agent without notice of the limitations upon his authority has a right to assume that he possesses the powers ordinarily possessed by agents in his position.<sup>8</sup> The custom or usage, however, must be well established, or the principal must have actual notice of its character.<sup>9</sup>

Example One: A employs B as his agent in the sale of goods, but expressly forbids him to warrant the goods. B disregards his instructions and warrants the goods to C, who purchases without knowledge of the limitations upon his authority. A is

<sup>7</sup> Bryan v. Jackson (supra).

<sup>8</sup> Young v. Cole, 3 Bing. (N. C.) 724; Hibbard v. Peek, 75 Wis. 619; Adams v. Ins. Co., 95 Pa. St. 348.

<sup>9</sup> Walls v. Bailey, 49 N. Y. 464; Robinson v. Mollett, L. R. 7, H. L. 802.

liable upon the warranty, since agents in B's position ordinarily have authority to warrant, and C had a right to assume that B's warranty was duly authorized.<sup>10</sup>

Example Two: The defendant authorizes his agent to purchase cotton in his behalf, but instructed him in no case to pay more than a certain price. The agent contracted to purchase plaintiff's cotton at a price in excess of the amount set by the defendant. The defendant is liable because the agent had apparent authority to make the purchase at any price that he deemed proper, and no limitation upon his power was known to the plaintiff.<sup>11</sup>

**§ 99. Distinction between actual and apparent authority.** As between the principal and the agent the only authority that the law recognizes is actual authority, including of course such incidental powers as may reasonably be necessary to carry into effect the object of the agency. If the agent exceeds his actual authority he cannot recover compensation for the services outside of his actual authority, but will be liable to his principal for a violation of his duties.

As between the principal and persons who in good

<sup>10</sup> *Nelson v. Cowing*, 6 Hill (N. Y.) 336; *Hubbard v. Tenbrook*, 124 Penn. St. 291, 10 Am. St. Rep. 585, M. 367; *Randall v. Kehlror*, 60 Me. 37, 11 Am. Rep. 169; *Dayton v. Hooglund*, 39 Ohio St. 671; *Talmage v. Bierhaue*, 103 Ind. 270, 2 N. E. 716; *Pickert v. Marston*, 68 Wis. 465, 32 N. W. 550, 60 Am. Rep. 876.

<sup>11</sup> *Butler v. Maples*, 9 Wall (U. S.) 766, 19 L. Ed. 822.

faith deal with the agent, we have seen that the principal will be liable for all acts of his agent, even in excess of authority; provided they fall within the apparent scope of his authority. So, the real test of the principal's liability to persons who deal with the agent without notice of limitations upon his authority is whether the agent had apparent authority, irrespective of what his actual authority may have been.

**§ 100. Apparent authority—Illustration of powers commonly included.** Authority to sell property of any kind usually carries with it a power to warrant the property<sup>12</sup> and to receive the purchase price, but not ordinarily to sell on credit.<sup>13</sup>

Authority to sell goods in possession at the time of sale includes also the right to collect the purchase price, or such portion of it as is required to be paid at the time, but no implied authority exists under which the agent may afterward collect the balance due, or to collect upon goods sold on credit.<sup>14</sup>

An agent who has authority to purchase goods for his principal has implied authority to pledge his principal's credit if not supplied with funds with which to purchase,<sup>15</sup> but he has no implied author-

<sup>12</sup> *Leroy v. Beard*, 8 How. (U. S.) 451, M. 382; *Peters v. Farnsworth*, 15 Vt. 155, 40 Am. Dec. 671, M. 387; *Pickert v. Marston*, 68 Wis. 465, 60 Am. Rep. 876, M. 411.

<sup>13</sup> *School District v. Aetna Insurance Co.*, 62 Me. 330, M. 194.

<sup>14</sup> *McKindly v. Dunham*, 55 Wis. 515, 42 Am. Rep. 740, M. 399.

<sup>15</sup> *Sprague v. Gillett*, 9 Metl. (Mass.) 91; *Watteau v. Fenwick*, L. R. (1893) 1 Q. B. D. 346, M. 369, R. 474.

ity to execute negotiable paper for the price of goods purchased, unless the purpose of the agency cannot otherwise be accomplished.<sup>16</sup> An agent with authority to collect has no implied authority to receive anything but money.<sup>17</sup> Authority to collect will be implied when the agent still retains securities given by the debtor for the debt.<sup>18</sup>

<sup>16</sup> *Temple v. Pomeroy*, 4 Gray (Mass.) 128; *Taber v. Cannon*, 8 Metl. (Mass.) 456; *Morris v. Bowen*, 52 N. H. 416, *Oberne v. Burke*, 30 Neb. 581, 46 N. W. Rep. 839.

<sup>17</sup> *Ward v. Smith*, 7 Wall (U. S.) 447, 19 L. R. Ed. 207; *Robinson v. Anderson*, 106 Ind. 152, 6 N. E. Rep. 12; *Pitkin v. Harris*, 69 Mich. 133, 37 N. W. Rep. 61; *Langdon v. Potter*, 13 Mass. 319; *Drain v. Doggett*, 41 Iowa 682.

<sup>18</sup> *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; *Guilford v. Stacer*, 53 Ga. 618; *Stiger v. Bent*, 111 Ill. 328.

## CHAPTER X

### EXECUTION OF AUTHORITY

- § 101. Nature of execution.
- § 102. Execution of written contracts.
- § 103. Descriptive words.
- § 104. Apt words necessary.
- § 105. Effect of excessive execution.

**§ 101. Nature of execution.** Since the object of creating an agency is to enable the principal to act through the instrumentality of the agent, it is the agent's duty to execute his authority in the precise manner indicated by the principal, in order that the latter's purpose be fully accomplished. He should confine his acts strictly within the scope of the powers conferred upon him.

**§ 102. Execution of written contracts.** Written contracts are strictly construed by the courts. While it is true that the aim of the law is to determine the real intention of the parties in any contract, whether it be oral or written, yet the presumption is that when a contract has been reduced to writing the real intention of the parties at the time of its formation are there set forth. Such an unchanging record is justly deemed more reliable

evidence than the faulty recollection of the parties, or their witnesses. In interpreting written contracts the courts scrutinize carefully the exact language of the parties. If an agent has executed a written contract in behalf of his principal it is necessary that the contract itself disclose the fact that he is acting merely as an agent, otherwise the agent himself may be bound.<sup>1</sup>

Example One: John Smith in executing a contract for William Green signed merely "John Smith, agent." John Smith is bound, for the agency is not sufficiently disclosed.

**§ 103. Descriptive words.** We shall see in a later chapter that the principal may be liable on a contract which the agent has executed in his behalf even though the agent has improperly executed it. The question confronting us now is, how should the contract be executed by an agent who desires to avoid incurring personal responsibility upon the contract?

It is obvious that he must fully disclose the fact of the agency and the name of the principal. It is not sufficient for him to add such terms as "agent," "trustee," "cashier," "president," etc., for the law regards these words as merely descriptive of the

<sup>1</sup> *Hobson v. Hassett*, 76 Cal. 203, 9 Am. St. Rep. 193, M. 442; *Kenyon v. Williams*, 19 Ind. 44; *Hobbs v. Cowden*, 20 Ind. 310; *Stinson v. Lee*, 68 Miss. 113, 8 So. Rep. 272; *Haverhill Ins. Co. v. Newhall*, 1 Allen (Mass.) 130; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101.

person who signs. If John Jones is the president of a shoe manufacturing company he may take enough pride in that fact to add his official title to his signature in contracts even of a personal nature. Or it may be that he uses the title to identify himself when there are other persons of the same name in the locality. At any rate the courts do not regard the adding of a title as such evidence of agency as will exempt the agent from personal liability upon the contract.

Example One: The defendant was president of a certain corporation and known to be such by the plaintiff. The corporation was indebted to the plaintiff to the sum of \$1,135. The defendant executed a promissory note for that amount and signed it "A. Hasset, President," but the name of the corporation was not disclosed. The court held, when action was brought upon the note against the defendant personally, that the defendant was liable.

"There is nothing on the face of the note," said the court, "to show that there was any principal back of the defendant. He signed his own name, and wholly failed to indicate, if he had a principal, who or what the principal was. The word 'president,' which he added to his name, must therefore be regarded as merely '*descriptio personæ*.'"<sup>2</sup>

Example Two: The defendant was the president of the Dorchester Avenue Railroad Co. The company authorized the defendant to procure insurance

<sup>2</sup> Hobson v. Hasset, 76 Cal. 203, 9 Am. St. Rep. 193, M. 442.

upon its property and to execute a promissory note in its behalf to obtain said insurance. The defendant procured insurance from the plaintiff and gave it a promissory note for five hundred dollars and signed the note "Cheever Newhall, Pres't of the Dorchester Avenue R. R. Co." Suit was brought against the defendant personally upon his note and the court held that the defendant was liable.

"The only question here raised," said the court, "is whether the plaintiff may legally charge the defendant upon this promissory note. The case does not involve the inquiry whether the plaintiffs might not, if they had so stated, have treated the note as the promise of the Dorchester Avenue Railroad Company, upon establishing the fact of the agency of Newhall, and that the contract was made in their behalf as principals. \* \* \* But upon the question of charging the defendant, we are to look merely at the form of the note and the formal obligation if any assumed by him. \* \* \* The words used are: 'I promise to pay,' etc. To this promise the name of the defendant is subscribed. The addition to his name, 'Pres't of the Dorchester Avenue R. R. Co.,' does not affect the personal liability of the signer."<sup>3</sup>

<sup>3</sup> Haverhill Ins. Co. v. Newhall, 1 Allen (Mass.) 130; Fiske v. Eldridge, 12 Gray (Mass.) 474; Packard v. Nye, 2 Met. (Mass.) 47; Forster v. Fuller, 6 Mass. 58; Thatcher v. Dinsmore, 5 Mass. 299; Simonds v. Heard, 23 Pick (Mass.) 120; Taft v. Brewster, 9 Johns. (N. Y.) 334; Barker v. Mechanic Fire Ins. Co., 3 Wend. (N. Y.) 94.



the same in behalf of the company. The plaintiff offered to prove that it was understood at the time that defendant signed as a joint maker. Oral evidence is admissible in such cases only to explain an ambiguity. But the court held that no ambiguity existed.

“Here the corporation could not sign its own name,” said the court, “and it is not otherwise shown on the face of the note than that Kraus signed the corporate name, and by adding the word ‘president’ to his own name, he shows conclusively that, as president of the corporation, he signed the note, and not otherwise. Such is the natural and reasonable construction of these signatures, and so it would be generally understood. The affix ‘cashier,’ ‘secretary,’ ‘president,’ or ‘agent’ to the name of the person sufficiently indicates and shows that such person signed the bank or corporate name and in that character and capacity alone. The use of the word ‘by’ or ‘per’ or ‘pro’ would not add to the certainty of what is thus expressed.”<sup>6</sup>

**§ 105. Effect of excessive execution.** As a general rule an execution of authority whether it be defective or excessive will not operate to bind the principal, although the agent himself may become liable upon the obligation intended for his principal. But an excessive execution may in some cases operate to bind the principal. If the excessive execu-

<sup>6</sup> *Liebscher v. Kraus* (supra).

tion includes within itself a complete execution of the power, and it is possible to separate the excess from such proper execution, the courts will disregard the excess and allow the authorized portion to stand.<sup>7</sup>

For example: P was the agent of C having parol authority to execute an agreement of sale of two lots of land belonging to C. P arranged the terms of a sale to L and executed in C's behalf a sealed agreement to convey. C conveyed one lot and this action was brought to recover damages for refusal to convey the other. The defense was that the agent had exceeded his authority by executing a sealed agreement. But the court held for the plaintiff.

"Our Statute of Frauds," said the court, "does not require the agent's authority to make a contract to convey land to be in writing; it exacts a written contract, not a written power to the agent.

\* \* \* Here a seal was not vital to the contract; there was no authority of the agent to attach a seal, therefore the seal is of no value; but the power to execute the contract without seal having been ample, so far it becomes the act of the principal, and inures as a simple contract."<sup>8</sup>

<sup>7</sup> Long v. Hartwell, 34 N. J. L. 116, M. 92; Wagoner v. Watts, 44 N. J. L. 126; Dickerman v. Ashton, 21 Minn. 538, W. 67; Thomas v. Joslin, 30 Minn. 388; Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765; Adams v. Power, 52 Miss. 828; Morrow v. Higgins, 29 Ala. 448; Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330.

<sup>8</sup> Long v. Hartwell (supra).

## CHAPTER XI

### LIABILITY OF PRINCIPAL TO THIRD PERSONS

- § 106. In general.
- § 107. For agent's contracts—Where principal is disclosed.
- § 108.       Scope of authority.
- § 109.       Where principal is not disclosed.
- § 110.       Exceptions—Election to hold agent.
- § 111.       What constitutes election.
- § 112.       Right to elect must be exercised promptly.
- § 113.       Exceptions—Settlement with agent.
- § 114.       Exceptions—Contract under seal.
- § 115.       Exceptions—Negotiable instruments.

§ 106. **In general.** Since the object of an agency is to enable an absent principal to conduct business with third persons through an agent, thereby acquiring the same rights as though he had acted in person, it is but just that the law should hold the principal for the liabilities arising from the acts of his agent, precisely as it would hold him if he had acted in person. It is, therefore, a well established rule of law that a principal is liable for all acts of his agent within the scope of the authority which he has conferred upon him. This liability may be classified under two general heads:

- (1) Liability upon contracts made by the agent.
- (2) Liability for torts and crimes of the agent.

**§ 107. Liability for agent's contracts—When principal is disclosed.** If an agent, acting in the due execution of his authority, enters into a contract for a disclosed principal, the latter will become as fully liable upon it as though he had executed the contract in person. The principal would also be liable upon an unauthorized contract which he had afterward ratified, but in the absence of ratification the principal would not be liable upon any contract made by the agent in his behalf unless the contract as executed was within the scope of the agent's authority.<sup>1</sup>

**§ 108. Scope of authority.** The scope of the agent's authority includes both express and implied authority. It is not essential, therefore, unless the agent is a special agent whose authority is in writing, that the contract be one expressly authorized by the principal. If it can fairly be said in view of all the circumstances that the agent had apparent authority to enter into the particular contract the principal will be bound. The question of what constitutes express and implied authority has been treated at length elsewhere,<sup>2</sup> and need not be repeated in this connection.

<sup>1</sup> *Pickert v. Marston*, 68 Wis. 465, 60 Am. Rep. 876, M. 411; *Komorowski v. Krumdieck*, 56 Wis. 23, M. 413; *Vescelins v. Martin*, 11 Col. 391, M. 422; *Huntley v. Mathias*, 90 N. C. 101, 47 Am. Rep. 516, M. 408; *Jackson v. National Bank*, 92 Tenn. 154, 20 S. W. Rep. 802, M. 415.

<sup>2</sup> See §§ 93-100 ante.

**§ 109. Liability for agent's contracts—When principal is not disclosed.** We have seen in an earlier chapter <sup>3</sup> that in order for a person to ratify an *unauthorized act* of another it is necessary that the act have been performed by one who openly avows at the time that he is acting as his agent. Thus if John Brown has contracted for the purchase of a horse, John Smith can take advantage of the contract by ratification only by proving that John Brown claimed at the time to have been acting as his agent in the transaction. If, therefore, John Brown had made the contract in his own name without alleging that he was acting as the agent of Smith, the latter could not ratify.

Quite a different rule applies, however, to cases where a *duly authorized agent* makes a contract in his principal's behalf without disclosing the agency. In such a case the real principal may come forward and claim the benefits of the contract, although such action on his part will not relieve the agent from personal responsibility if the other party desires to hold him.

On the other hand, if the undisclosed principal does not desire to assume responsibility for the agent's act, this will not defeat the other party's right to hold him liable upon it. An undisclosed principal, upon discovery, becomes as fully responsible, if the other party chooses to hold him, as though his identity had been known from the begin-

<sup>3</sup> See Chap. VI, § 79.

ning of negotiations.<sup>4</sup> The reason for this rule is that no ratification is needed to perfect the principal's rights, nor to charge him with liabilities. When his duly authorized agent acts in a matter falling within the scope of his authority, the rights and liabilities of the principal become fixed. Parol evidence is admissible to establish the existence and identity of the principal.

For example: H, the proprietor of an inn, had sold out his business to the defendants, but continued as the manager of the inn and his name remained over the door. The plaintiffs sold H a quantity of cigars on credit, supposing that he was the proprietor of the inn. Later they discovered that the defendants were the real proprietors and brought suit against them for the price of the cigars. It appeared that the defendants had forbidden H to purchase cigars on credit. The court held that the defendant was liable. Said the court:

"I think that the Lord Chief Justice during the argument laid down the correct principle, viz., once it is established that the defendant was the real principal, the ordinary doctrine as to principal and agent applies—that the principal is liable for all the acts of the agent which are within the authority

<sup>4</sup> Schendel v. Stevenson, 153 Mass. 351, 26 N. E. 689; Maxcy Mfg. Co. v. Burnham, 89 Me. 538, 36 Atl. Rep. 1003; Kayton v. Barnett, 116 N. Y. 625, M. 553, R. 469, W. 652, H. 389; Hubbard v. Tenbrook, 124 Pa. 291, 16 Atl. Rep. 817, M. 367, H. 390; Watteau v. Fenwick, L. R. (1893) 1 Q. B. Div. 346, M. 369, H. 391, W. 654; Briggs v. Partridge, 64 N. Y. 357, R. 462; Waddell v. Sebrece, 88 Va. 1012, 14 S. E. Rep. 849, 29 Am. St. Rep. 766.

usually confided to an agent of that character, notwithstanding limitations as between the principal and the agent put upon that authority.”<sup>5</sup>

**§ 110. Exceptions—Election to hold agent.** Although the law gives the person dealing with the agent of an undisclosed principal the right to hold such principal upon discovery, yet if, after discovery of the principal, he still chooses to consider the agent as the debtor he cannot afterward hold the principal.<sup>6</sup> In other words, if with full knowledge of the circumstances he deliberately elects to hold the agent rather than the principal this election is final and cannot be retracted.<sup>7</sup>

Full knowledge of the circumstances implies a knowledge not merely of the fact that an agency exists, but also of the identity of the principal. A person who deals with an agent, even with knowledge that he is acting as an agent, cannot be said to have elected to hold him exclusively, unless it can also be shown that he knew who the principal was, and thus had the opportunity to choose between the two.

**§ 111. What constitutes election.** If a principal desires to set up in defense that the other party has

<sup>5</sup> *Watteau v. Fenwick* (supra).

<sup>6</sup> *Guest v. Burlington Opera House Co.*, 74 Iowa 457; *Ferry v. Moore*, 18 Ill. App. 135; *Beymer v. Bonsall*, 79 Pa. St. 298, M. 554; *Curtis v. Williamson*, L. R. 10 Q. B. 57; *Kingsley v. Davis*, 104 Mass. 178, H. 398.

<sup>7</sup> *Barrell v. Newby*, 127 Federal 656, R. 490.

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elected to hold the agent he must necessarily prove the fact of such election by admission, or by unequivocal acts of the third party. If admissions are proven the rule would be much the same in all jurisdictions—the principal would escape liability. Where, however, the fact of election must be established in whole or in part from the conduct of the third party a perplexing problem arises, and the courts of different jurisdictions are not in harmony as to what conduct shall be deemed to amount to election.

To accept a written instrument in the name of the agent, knowing at the time of the identity of the principal, has been held in some jurisdictions to amount to an election to hold the agent; and that parol evidence would not be admissible to charge the principal;<sup>8</sup> but in other jurisdictions it has been held that such conduct does not amount to an election.<sup>9</sup>

Filing a claim against an agent's estate in bankruptcy, knowing of the identity of the principal, is not considered an election,<sup>10</sup> although it may be evidence of such election. So, also, if the third party with knowledge of the principal's identity brings suit against the agent.<sup>11</sup>

<sup>8</sup> *Chandler v. Coe*, 54 N. H. 561.

<sup>9</sup> *Byington v. Simpson*, 134 Mass. 169; *Merrill v. Kenyon*, 48 Conn. 314.

<sup>10</sup> *Curtis v. Williamson*, L. R. 10 Q. B. 57.

<sup>11</sup> *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51; *Steele-Smith Grocery Co. v. Potthast*, 109 Iowa 413, 80 N. W. 519; *Ferry v. Moore*, 18 Ill. App. 135.

Some jurisdictions declare that even the securing of a judgment in a suit against the agent will not bar the right to hold the principal if the judgment is not satisfied,<sup>12</sup> but in England and Massachusetts the courts regard the obtaining of judgment against the agent as a conclusive election to hold him only.<sup>13</sup>

**§ 112. Right to elect must be exercised promptly.** It is generally held that the right to hold the undisclosed principal must be exercised within a reasonable time after discovering his identity, otherwise the right will be deemed to have been waived.<sup>14</sup> The question of what is a reasonable time is of course determined from a consideration of all the facts and circumstances.

**§ 113. Exceptions—Settlement with agent.** By the general current of authority in this country, the undisclosed principal may escape liability by proving that he has in good faith settled with the agent before notice of the other party's intention to hold him upon the contract.<sup>15</sup> Under the American doc-

<sup>12</sup> *Brown v. Reiman*, 48 App. Div. 295, 62 N. Y. Supp. 663, H. 401; *Beymer v. Bonsall*, 79 Pa. 298.

<sup>13</sup> *Priestley v. Fernie*, 3 H. & C. 977; *Kingsley v. Davis*, 104 Mass. 178, H. 398.

<sup>14</sup> *Smethurst v. Mitchell*, 1 E. & E. 622; *Curtis v. Williamson*, L. R. 10 Q. B. 57.

<sup>15</sup> *Laing v. Butler*, 37 Hun (N. Y.) 144, H. 396; *McCullough v. Thompson*, 45 N. Y. Super. 449; *Knapp v. Simon*, 96 N. Y. 284; *Belfield v. National Supply Co.*, 189 Pa. 189, 42 Atl. Rep. 131; *Emerson v. Patch*, 123 Mass. 541; *Story on Agency*, § 449, 23 Am. Law Rev. 565; *Contra*, *Hyde v. Wolf*, 4 La. 234, 3 Am. Dec. 484.

trine, therefore, the undisclosed principal may safely settle with his agent at any time before notice, actual or implied, that the other party to the contract purposes to look to him rather than to the agent. This doctrine doubtless owes its origin to a *dictum* in the English case of *Thompson v. Davenport*.<sup>16</sup> Curiously enough this doctrine has been expressly repudiated in England and a different ruling has been established there, although the former doctrine seems to have become permanently engrafted upon the American law in most jurisdictions.

The present rule in England requires not only that the undisclosed principal shall have settled with the agent, but he must also prove that the other party to the contract by word or conduct has led him to believe that he has settled with the agent or elected to give credit to the agent alone.<sup>17</sup> In other words, he must prove such facts as would estop the other party to set up his claim.

**§ 114. Exceptions—Contract under seal.** If the contract between the agent and the other party is of a nature required by law to be under seal and it has been so executed, and neither the recitals nor the method of signing disclose the principal, the other party has no rights against the undisclosed principal. This rule is accounted for by the fa-

<sup>16</sup> 9 Barn. & Cress., 78, 86; 2 Smith's Leading Cases.

<sup>17</sup> *Irvine v. Watson*, 5 Q. B. D. 414, M. 550; *Davidson v. Donaldson*, L. R. 9 Q. B. D. 623; *Heald v. Kenworthy*, 10 Exch. 739.

miliar doctrine of the common law that only the parties named or described in a sealed instrument can sue or be sued upon it.<sup>18</sup> The agent who signs such a contract without disclosing his principal becomes himself liable upon the contract.

**§ 115. Exceptions—Negotiable instruments.** An undisclosed principal cannot be rendered liable on a negotiable instrument. By the strict rules of the law merchant, a person into whose hands such a document comes acquires rights against those persons only whose names appear thereon, either as maker, acceptor, or indorser. No other person can be added to the list by parol.<sup>19</sup> If, however, there is in the document an ambiguity as to whether the agent or the principal was intended to be bound, parol evidence is admissible to explain the ambiguity.<sup>20</sup>

<sup>18</sup> *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617; *Kierstead v. Orange, etc., R. Co.*, 69 N. Y. 343; *Borcherling v. Katz*, 37 N. J. E. 150; *Huntington v. Knox*, 7 Cush. (Mass.) 371; *Elwell v. Shaw*, 16 Mass. 42, 8 Am. Dec. 126.

<sup>19</sup> *Sturdivant v. Hull*, 59 Me. 172; *Powers v. Briggs*, 79 Ill. 493; *Sparks v. Dispatch Transfer Co.*, 104 Mo. 531; *Bradlee v. Boston Glass Manufactory*, 16 Pick (Mass.) 347; *Brown v. Parker*, 7 Allen (Mass.) 337; *Slawson v. Loring*, 5 Allen (Mass.) 340; *Huntington v. Knox*, 7 Cush. (Mass.) 371.

<sup>20</sup> *Reeve v. First Nat. Bank*, 54 N. J. L. 208; *Bean v. Pioneer Mining Co.*, 66 Cal. 451.

## CHAPTER XII

### LIABILITY OF PRINCIPAL TO THIRD PERSONS—Continued

- § 116. Torts of the agent or servant.
- § 117. Principal's liability for.
- § 118. Scope of employment.
- § 119. Acts incidental to employment.
- § 120. Mistake in execution of orders.
- § 121. Deviation from instructions.
- § 122. When deviation is extreme.
- § 123. Negligence.
- § 124. Servant's wilful misconduct.

**§ 116. Torts of the agent or servant.** We have seen that a person may become as fully responsible upon contractual obligations entered into in his behalf by an agent as though he had acted in person. The question now arises as to the principal's liability for torts committed by an agent or servant. Obviously if the principal committed a tort while acting for himself he would be liable therefor. If another person is acting in his stead and inflicts an injury upon third persons, may the tort be considered the tort of the principal?

Suppose the tort itself is one that the principal has expressly forbidden the servant or agent to commit, must the principal reimburse the injured party?

Liability in such a case may be indeed a hardship on the principal, for he is an innocent party; but the person against whom the tort has been committed by the agent is also an innocent party. As between two innocent parties the law declares that if one of them has made it possible for the other to be injured, then upon him shall be visited the burden of the wrong. The principal in employing the agent or servant who has committed the tort stands in the position of one who has made it possible for the other to be wronged and he will be held liable for the extent of the injury. "In every such case," says Judge Story, "the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency."<sup>1</sup>

**§ 117. Principal's liability for torts of agent or servant.** A principal is liable for all torts of his agents or servants committed while they are acting within the scope of their employment. If he participates in the act, or commands or ratifies it, his liability is of course unquestioned.<sup>2</sup> If the agent or servant acts of his own volition without the knowledge or consent of his principal the latter is nevertheless liable if the act was committed within the scope of the employment.<sup>3</sup> He is liable also even though he has expressly forbidden the act.

<sup>1</sup> Story Agency, § 452.

<sup>2</sup> Dempsey v. Chambers, 154 Mass. 330.

<sup>3</sup> Turner v. North Beach etc. R. Co., 34 Col. 594; Moir v. Hop

It should constantly be borne in mind, however, that the agent or servant is himself liable for the tort, and the injured party has a right to sue either employer or employee. This right of action against the employer serves a double purpose—it quickens the employer's zeal to employ competent and trustworthy agents or servants, and renders it possible for the injured party to find redress against an ordinarily responsible party when there might be no redress against an irresponsible agent or servant.

**§ 118. Scope of employment.** The term “scope of employment” is difficult accurately to define. In general, it may be said that if the agent or servant was at the time of the commission of the tort engaged in the performance of the duty entrusted to him by his principal, and the act itself was a natural outcome of such performance and intended, however mistakenly, to further the performance of the duty in hand, it comes within the scope of employment.

For a more correct understanding of the term we must proceed to an examination of the practical phases of the subject, and the different classes of

kins, 16 Ill. 313, 63 Am. Dec. 312; *Pittsburg etc. R. Co. v. Kirk*, 109 Ind. 399, 52 Am. Rep. 675; *Rounds v. Delaware etc. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597; *Howe v. Newmarch*, 12 Allen (Mass.) 49.

cases which the courts have declared to fall within the term scope of employment. In this discussion the term servant will sometimes be used as covering both agent and servant, for torts such as we are now considering have chiefly to do with servants.

**§ 119. Scope of employment—Acts incidental to employment.** Torts which result in the natural course of the agent's duty and incidental to it are within the scope of employment. The principal is bound to foresee such injuries to others and, in the contemplation of the law, voluntarily assumes the risk when he employs another to act for him in the performance of the particular duty.

Example One: Dow was the agent of the defendant in the sale of railroad tickets and it was a part of his duty to post in the office notices pertaining to the business there carried on. He posted a newspaper clipping of a libelous nature concerning the plaintiff, a neighboring ticket broker, to the effect that the plaintiff was neither safe nor reliable to deal with. This clipping was posted for several weeks and the general passenger agent of defendant railroad, although called upon to do so, refused to interfere. The court held that the defendant was liable. Said the court:

“Dow was in charge of the office, subject to the supervision of the general passenger agent. One of the uses of the office was to advertise tickets and presumptively to furnish information in relation to

the purchase of tickets. It may be inferred that it was a part of his duty to post in the office notices pertaining to the business carried on there. The libel which he posted was calculated to diminish the plaintiff's and thereby to increase the defendant's income from the sale of tickets. In these and other facts and circumstances, there was evidence that his act was done in the course of his business as a servant of the defendant. If that was so done, the defendant is liable for it, even though it was in excess of his authority and wrongful."<sup>4</sup>

Example Two: The plaintiff ordered coal of the defendant, who was a coal dealer. M, who was not in the employ of the defendant, took the coal from defendant's yard in one of the defendant's wagons. While unloading the coal he carelessly broke a plate glass window in the plaintiff's building. The defendant, although aware of the accident, presented a bill for the coal. The plaintiff claimed that this was in effect a ratification of the unauthorized delivery of the coal by M and rendered the defendant as fully liable for M's acts as though he had been his servant at the time. The court held that the plaintiff's contention was correct.

"The ratification," said the court, "was not directed specifically to McCulloch's trespass, and that act was not for the defendant's benefit if taken by itself, but it was so connected with McCulloch's

<sup>4</sup> *Fogg v. Boston & Lowell R. Co.*, 148 Mass. 513.

employment that the defendant would have been liable as master if McCulloch really had been his servant when delivering the coal. \* \* \* We are of the opinion that consistency with the whole course of authority requires us to hold that the defendant's ratification of the employment established the relation of master and servant from the beginning, with all its incidents, including the anomalous liability for his negligent acts."<sup>5</sup>

**§ 120. Scope of employment—Mistake in execution.** It sometimes happens that a servant or agent misunderstands the orders of his principal; or where the manner of performance is left to his discretion, acts stupidly or with reckless zeal that results in injury to the person or property of others. In all such cases the principal is liable if it can fairly be said that the act was within the scope of the servant's employment.<sup>6</sup>

Example One: A master instructs his servant to go to a certain field and kill an animal belonging to the master. The servant by mistake kills an animal belonging to the plaintiff. The master is liable.<sup>7</sup>

Example Two: The defendant told his servant to go and get the plaintiff's team. The servant, without first obtaining the plaintiff's consent, went

<sup>5</sup> Dempsey v. Chambers, 154 Mass. 330.

<sup>6</sup> Maier v. Randolph, 33 Kans. 340; May v. Bliss, 22 Vt. 477; Moir v. Hopkins, 16 Ill. 313, 63 Am. Dec. 312.

<sup>7</sup> Maier v. Randolph (supra).

to the latter's barn and took the team away and seriously injured it. The defendant is liable.<sup>8</sup>

Example Three: The plaintiff had purchased furniture of the defendant on a lease which contained a provision that in case of forfeiture the defendant might enter and remove the furniture. The plaintiff had made default in payments and the defendant sent M and C and H to remove the furniture. The plaintiff objected to the removal and his wife stood by as an able second. Notwithstanding their strenuous defense of their "household gods," the plaintiff was knocked down, his wife was "struck a violent blow in the breast and Carroll kicked her in the abdomen, and they then took the glass with the other goods, and went away." The outraged plaintiff brought suit and the court held that he could recover.

"The test of the liability of the master," said the court, "is that the act of the servant is done in the course of doing the master's work, and for the purpose of accomplishing it. If it is so done it is the act of the master, and he is responsible whether the wrong done be occasioned by negligence, or by a wanton and reckless purpose to accomplish the master's business in an unlawful manner."<sup>9</sup>

**§ 121. Scope of employment — Deviation from instructions.** It sometimes happens that a servant

<sup>8</sup> *Moir v. Hopkins* (supra).

<sup>9</sup> *Levi v. Brooks*, 121 Mass. 501.

disregards the instructions of his principal and, while still ostensibly about his duties, turns aside therefrom for some purpose of his own. We shall see later that if he can be said to have completely abandoned his master's service, even temporarily, the latter is not liable for his acts. The chief difficulty arises, however, when he is still about his master's tasks, but is combining therewith some purpose of his own, such as a personal errand or personal enjoyment. The test seems to be that if the agent or servant is making his own purpose subordinate to that of his principal at the time of the wrongful act the principal is liable therefor. In other words, the deviation must be shown to have been comparatively slight.

Example One: The defendant's servant, who was the driver of his phaeton, was instructed by the defendant to take the team to the Red Lion stables. Instead of proceeding directly to his destination the servant took a roundabout way in order to deliver a parcel for his wife to her parents. He delivered the parcel and shortly after negligently ran into and injured the plaintiff, an old lady. Suit was brought and the court held that the defendant was liable notwithstanding the deviation.

"In this case," said the court, "I am of opinion that the servant was acting within the course of his employment, and till he had deposited the carriage in the Red Lion stables, in Castle street, in Leicester Square, the defendant was liable for any injury

which might be committed through his negligence.”<sup>10</sup>

Example Two: Taylor was the manager of the defendant's sales stables. He had a horse and gig, his own property, which was kept for him on the premises of the defendant free of charge, which he was accustomed to use when going out upon the defendant's business. Smith had bought a horse of the defendant which he had not paid for. On the 10th of November, 1856, Taylor was going in the gig to see his physician, intending to call upon Smith during the return trip. While Taylor was harnessing for the trip the defendant asked him where he was going, and Taylor told him he was going to get Smith's money. Before reaching his physician's residence Taylor's team negligently collided with the plaintiff's team and the plaintiff's horse was killed. Suit was brought and the court held that the defendant was liable.

Said Cockburn, C. J.: “I think there was abundant evidence here that Taylor was driving, at the time the accident occurred, with the defendant's authority and in the course of business as his servant. Taylor, it appears, was the general manager of the defendant's establishment; and, being so, he, either by express agreement or by some tacit arrangement was in the habit of using in transacting the defendant's business a horse and gig, his own property, which, in consideration of that arrange-

<sup>10</sup> Sleath v. Wilson, 9 C. & P. 607, W. 122.

ment, were left for him on the defendant's premises free of charge. Looking at these circumstances and considering the nature of the business, I think Taylor must be assumed to have had authority to exercise his discretion as to the mode of performing his duty to his master. Adding to this the fact that the master knew that his servant was using the horse and gig on the particular occasion, I think the evidence was ample to show that what was done had the sanction and authority of the master.”<sup>11</sup>

Example Three: In the case of *Ritchie v. Waller*<sup>12</sup> the court said: “In such cases it is, and must usually remain, a question depending upon the degree of deviation and all the attendant circumstances. In cases where the deviation is slight and not unusual, the court may and often will, as a matter of law, determine that the servant was still executing his master's business. So, too, where the deviation is very marked and unusual, the court in like manner may determine that the servant was not on the master's business at all, but on his own. Cases falling between these extremes will be regarded as involving merely a question of fact, to be left to the jury or other trier of such questions.”

**§ 122. When deviation is extreme.** If the deviation is so extreme as to indicate that the agent or servant has lost sight, even temporarily, of the

<sup>11</sup> *Patten v. Rea*, 2 C. B. n. s. 606, W. 157.

<sup>12</sup> 63 Conn. 155, 161.

duties imposed upon him by his principal the latter is not liable. The question of whether he has lost sight of his duties is always one of fact, and all the circumstances must be taken into consideration.<sup>13</sup>

Example One: An armed watchman was employed to guard a brewery and prevent breaches of the peace. A person came upon the premises intoxicated and disorderly. The watchman pursued him and during the chase shot him. The court held that the owners of the breweries were not liable.<sup>14</sup>

Example Two: Section men employed by the defendant railroad to repair its track kindled a fire on the right of way for the purpose of cooking their dinner. They left the fire still smouldering and it spread and caused damage to the plaintiff's property. The court held that the defendant was not liable.

Said the court: "In determining whether a particular act is done in the course of the servant's employment, it is proper to inquire whether the servant was at the time engaged in serving his master. If the act be done while the servant is at liberty from the service, and pursuing his own ends exclusively, the master is not responsible. If the servant was at the time when the injury was in-

<sup>13</sup> Burns v. Poulson, L. R. 8, C. P. 563; Bard v. Yohn, 26 Pa. St. 482; Morier v. St. Paul etc. R. Co., 31 Minn. 351, 17 N. W. 952; Golden v. Newbrand, 52 Iowa 59, 35 Am. Rep. 257, R. 284; Staples v. Schmid, 18 R. I. 224, 26 Atl. 193, 19 L. R. A. 824; Ritchie v. Waller, 63 Conn. 155, 28 Atl. 29, 27 L. R. A. 161.

<sup>14</sup> Golden v. Newbrand (*supra*).

dicted acting for himself and as his own master, *pro tempore*, the master is not liable. If the servant steps aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended."<sup>15</sup>

**§ 123. Scope of employment—Negligence.** If a principal entrusts to an agent or servant the performance of a certain duty and the latter performs it in so negligent a manner that injury results to others, the principal will be held liable for the damages sustained.<sup>16</sup>

For example: The defendant's servant, instead of placing his master's truck in the yard provided for it, where he had been directed to leave it on the termination of his day's work, left it standing by the sidewalk in a public street, which was twenty-six feet in width between the curbstones, with the shafts shored up or supported in the customary manner by a plank. There was also an obstruction on the other side of the street leaving barely room enough for wagons to pass between it and the defendant's truck. The driver of a truck not belonging to the defendant attempted to pass through, and

<sup>15</sup> Morier v. St. Paul etc. R. Co., 31 Minn. 351, 17 N. W. 952.

<sup>16</sup> Powell v. Deveney, 3 Cush. (Mass.) 300; Ballou v. Farnum, 9 Allen (Mass.) 47; Higgins v. Watervliet Turnpike Co., 46 N. Y. 23, 7 Am. Rep. 293; Cosgrove v. Ogden, 49 N. Y. 255, 10 Am. Rep. 361; Pittsburg etc. R. Co. v. Kirk, 102 Ind. 399, 52 Am. Rep. 675; Armstrong v. Cooley, 10 Ill. 509; Cleveland v. Newsom, 45 Mich. 62; Garretzen v. Duencel, 50 Mo. 104, 11 Am. Rep. 405, R. 269.

was not guilty of negligence in so doing. His truck collided with the defendant's truck and in consequence of the collision the shafts of the latter were thrown from the plank on which they were supported and were whirled around onto the sidewalk. Plaintiff, who was then passing along the sidewalk, was struck and knocked down and her leg broken. Upon suit being brought the court held that the defendant was liable.

"The servant was rightfully in possession of the truck," said the court, "and being thus rightfully in possession, and about his master's business, the master must be responsible for his neglect in improperly leaving the truck in the street."<sup>17</sup>

**§ 124. Scope of employment — Servant's wilful misconduct.** The liability of a master for the torts of an agent or servant extends even to tort arising from the latter's wilful misconduct, provided the act itself came within the scope of employment. In case of wilful torts where the servant is actuated by anger or malice, it is of course easier for his master to prove that the servant abandoned the employment temporarily for purposes of his own. If this can be established the master will not be liable. The test that seems to be employed to determine the question of the master's liability, is whether or not the act was incidental to the employment, that is, one

<sup>17</sup> Powell v. Deveney (supra).

which was calculated to facilitate matters in the carrying out of the servant's duties.

Example One: The plaintiff's horses and chariot had been left unattended. The defendant's horses became entangled with the plaintiff's team through the fault of the defendant's coachman. While so entangled the defendant's coachman struck the plaintiff's horses with his whip and they moved forward and overturned the chariot and injured it. Suit was brought and the court held for the plaintiff.

"On the second point," said the court, "the distinction is this: If a servant driving a carriage, in order to effect some purpose of his own, wantonly strikes the horses of another person and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes out injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct for which the master will be liable, being an act done in pursuance of the servant's employment." <sup>18</sup>

Example Two: The plaintiff was driving in a buggy and had occasion to cross the track of the defendant company. As he was crossing, a blockade of trucks and other vehicles arrested his progress so that the rear wheels of his buggy were on the track. While the plaintiff was waiting for an opportunity to move on a horse car of the defendant com-

<sup>18</sup> Croft v. Alison, 4 B. & Ald. 590, R. 263.

pany approached. The driver told plaintiff to get off the track. The plaintiff asked him to wait until the trucks moved, promising then to move. The driver said, "D—n you, if you don't get off here—I am late—I will get you off some other way." The trucks started, and as the plaintiff prepared to move on, the driver started his horses, and the platform of the car struck the hind wheels of the buggy and overturned it, causing the injury complained of. Upon suit being brought the court held for the plaintiff.

Said the court: "The driver was driving his car for the defendant and in its business. As the car could only run upon the railroad track, it was his duty, so far as he reasonably and peaceably could, to overcome obstacles on the track in the way of his car; and in driving his car and overcoming these obstacles, he was acting within the general scope of his authority. If he acted recklessly (and that is the most that can be said here), the defendant was responsible for his acts. He was not seeking to accomplish his own ends. He was seeking to make his trip on time, and for that purpose, and not for any purpose of his own, sought to remove plaintiff's buggy from the track."<sup>19</sup>

<sup>19</sup> *Cohen v. Dry Dock & C. R. Co.*, 69 N. Y. 170, H. 647; *Baltimore etc. R. v. Pierce*, 89 Md. 495; *Nelson Business College Co. v. Lloyd*, 60 Ohio St. 448.

## CHAPTER XIII

### LIABILITY OF PRINCIPAL TO THIRD PERSONS—Continued

- § 125. Liability of master in case of transfer of service.
- § 126. When is transfer complete.
- § 127. Transfer of personal service.
- § 128. Transfer of servant and horses or machinery.
- § 129. Liability for servant compulsorily employed.
- § 130. Liability for crimes of agents or servants.
- § 131. Negligent failure to exercise due control over servant.
- § 132. Where liability is imposed by statute.

**§ 125. Liability of master in case of transfer of service.** The problem here presented is a difficult one, and the decisions upon it are conflicting. If a master permits his servants temporarily to enter the employ of another and torts are committed by them while so acting, is the master liable therefor; or does liability attach to the person whom they are temporarily serving? This is one of the questions that arises. Another concerns the rights of the servant whose services are transferred, or of the servants of the temporary employer.

There is a common law rule that if one servant is injured by reason of the tort of a fellow servant, he has no redress against their common employer, since in contemplation of the law he assumed the risk of

such torts when he entered the employment. If, then, the servant transferred becomes in truth the servant of the temporary employer, he is a fellow servant within the meaning of the rule.

As may be readily inferred the difficulty in this connection arises more from the facts in the particular case than from the law. The law itself is well settled that if the transfer of service is complete it will render the transferee, or temporary employer, liable for the torts of the servant and will subject the servant himself to the operation of the fellow servant rule already referred to.<sup>1</sup>

**§ 126. Transfer of service—When is transfer complete?** While the courts have never formulated tests whereby it could be determined if a given transfer of service is complete, yet an analysis of the cases themselves seems to indicate that the following tests are reasonably accurate:

**§ 127. Transfer of personal service.** If the transfer is merely of the personal service of a servant, and the transferee assumes the power to direct the servant's acts, the transfer is complete and the transferee becomes liable for the servant's torts.<sup>2</sup>

<sup>1</sup> *Hasty v. Sears*, 157 Mass. 123; *Gagnon v. Dana*, 69 N. H. 264; *Rourke v. White Moss Colliery Co.*, L. R. 2, C. P. D. 205; *Donovan v. Laing*, L. R. 1893, 1 Q. B. 629, H. 615.

<sup>2</sup> *Jones v. Scullard*, 1898, 2 Q. B. 565, H. 617; *Hasty v. Sears*, 157 Mass. 123; *Samuelian v. American Tool Co.*, 168 Mass. 12; *Ewan v. Lippincott*, 47 N. J. L. 192; *Higgins v. Western Union*

Example One: The defendant kept his horses and carriage at W's stable. L, one of the employees of W, was accustomed to act as driver for the defendant whenever the latter had occasion to use his team. The defendant had supplied L with a suit of livery for such occasions. The plaintiff was injured by the negligent driving of L while dressed in the defendant's livery and while driving for him. The court held that the defendant was liable.

Said the court: "What control had the livery stable keeper over the driver while driving the defendant's horse? Absolutely none. The whole control was in the defendant, who could have ordered the driver to go fast or slow, or stop or go on, just as he pleased, or to keep the horse without food, or otherwise manage the horse as he directed. \* \* \* The principle then to be extracted from the cases is that, if the hirer simply applies to the livery stable keeper to drive him between certain points or for a certain period of time, and the latter supplies all necessary for that purpose, the hirer is in no sense responsible for any negligence on the part of the driver. But it seems to be altogether a different case where the brougham, the horse, the harness, and the livery are the property of the person hiring the services of the driver."<sup>3</sup>

Example Two: The plaintiff was a carpenter

Tel. Co., 156 N. Y. 75; Thorpe v. N. Y. C. & H. R. R. Co., 76 N. Y. 402; Pennsylvania Co. v. Roy, 102 U. S. 451.

<sup>3</sup> Scullard v. Jones (*supra*).

employed by N. The latter told him that there was some work to be done in the defendant's building, and that the superintendent of the building would tell him what was to be done. He went to the building and the superintendent instructed him to fix the framework of the elevator door on the first floor. The elevator boy was told not to run the elevator below the second story until he was notified that the plaintiff had finished his work and had left the well. At the time of the injury the plaintiff was in the elevator well on a step ladder in order to reach the door. The elevator boy negligently ran the elevator below the second floor and injured the plaintiff. The plaintiff sued the owners of the building and the latter set up in defense that the elevator boy was a fellow servant with the plaintiff and that the plaintiff had assumed the risk of the boy's negligence. The court held that the defendant's contention was correct.

"It is obvious," said the court, "that C. A. Noyes & Co. were not contractors. The transaction between them and the defendant was the loan by them to the defendant of their servant, the plaintiff, who was to be under the control of the defendant by his superintendent while engaged in the work. This made the plaintiff *pro hac vice* a servant of the defendant. \* \* \* The plaintiff was not acting under the immediate orders of his general masters, C. A. Noyes & Co., but was acting under the orders of the defendant's superintendent, and thus became

the defendant's servant, notwithstanding that he remained the general servant of C. A. Noyes & Co. and was paid by them. \* \* \* <sup>4</sup> The case thus comes clearly within the principle, that, when a man enters an employment in the carrying on of which others are engaged with him, he tacitly agrees to accept all the ordinary risks attending it." <sup>5</sup>

**§ 128. Transfer of servant and horses or machinery.** If the transfer includes not only the personal services of the servant, but also carries with it the transfer of horses or machinery which he is to manage, the courts usually hold that the transfer is not complete and that torts of the servant while thus temporarily employed nevertheless render his master liable.<sup>6</sup> If, however, the servant is to operate the machinery merely as the agency through which the transferee's immediate commands are carried out, then the courts regard the transfer as complete.<sup>7</sup>

<sup>4</sup> To the same effect see *Forsyth v. Hooper*, 11 Allen (Mass.) 419; *Kimball v. Cushman*, 103 Mass. 194, 198; *Clapp v. Kemp*, 122 Mass. 481; *Linnehan v. Rollins*, 137 Mass. 123; *Johnson v. Boston*, 118 Mass. 114, 117.

<sup>5</sup> *Hasty v. Sears* (supra).

<sup>6</sup> *Little v. Hackett*, 116 U. S. 366; *Lewis v. Long Island R. Co.*, 162 N. Y. 52, 66; *New York, L. E. & W. R. Co. v. Steinbrenner*, 47 N. J. L. 161; *Murry v. Dwight*, 161 N. Y. 301, H. 620.

<sup>7</sup> *Ronrke v. White Moss Colliery Co.*, L. R. 2, C. P. D. 205, W. 229; *Donovan v. Laing*, 1893, 1 Q. B. 629, H. 615; *McQuerney v. D. & H. Canal Co.*, 151 N. Y. 411; *Thorpe v. N. Y. C. & H. R. R.*, 76 N. Y. 402; *Powell v. Construction Co.*, 88 Tenn. 692; *Miller v. Minnesota & Northwestern Ry*, 76 Iowa 655; *Pennsylvania Co. v. Roy*, 102 U. S. 451.

The question is, of course, one of fact. Let us then examine a few of the cases that illustrate each phase of the question.

Example One: The plaintiff was the servant of a truckman. He was sent by his master with a horse to do some hoisting at the defendant's warehouse. By reason of the negligence of the defendant's employees, a pulley block fell upon the plaintiff and inflicted a painful injury. He sued the defendant for damages, but the latter claimed that the accident was the result of the negligence of a fellow servant and gave, therefore, no grounds for action. The court held that the plaintiff could recover. Said the court:

“The fact that the plaintiff detached the truck and performed the job with the horse alone did not change the character of the employment, nor the legal relation that exists between an ordinary truckman and his customers. The goods were moved, it is true, not by the truck, but by another contrivance, and the plaintiff's duty was to manage and guide the horse, which was the real power behind the pulleys and tackle, as it would have been when hitched to the truck. In this capacity the plaintiff represented his general master, the truckman, and was all the time his servant, and did not become in any legal sense the servant of the defendant any more than he would if employed to move the goods to a railroad station on the truck, and if not such

servant he could not, of course, have become the coservant of the defendant's regular workmen."<sup>8</sup>

Example Two: K was a teamster in the employ of the defendant, a truckman. With horse and wagon, K had been working for the Boston Electric Light Company under some agreement between the latter and the defendant. The plaintiff was struck and injured by reason of the negligent driving of K. He sues the defendant who tries to escape liability on the ground that there has been a transfer of service. It appeared that K worked each day at whatever task was appointed for him by the foreman of the electric light company, returning with his team at night to the defendant's stable. The court held that these facts indicated that K was still the servant of defendant and hence that the defendant was liable.<sup>9</sup>

Example Three: The plaintiff was injured through the negligence of W, who was operating a crane belonging to the defendants, but which, with W to operate it, had been lent to J. J was engaged in unloading a ship and having no crane which could be used for the purpose, borrowed a crane and operator from the defendant. The court held that the transfer of service was complete, owing to the nature of the service rendered. Said the court:

"The ordinary mode of using a crane for loading a ship is well known. The goods to be loaded are

<sup>8</sup> Murray v. Dwight (supra).

<sup>9</sup> Driscoll v. Towle, 181 Mass. 416, H. 618.

fastened to the chain and raised, and then the arm of the crane is swung around, so as to bring the goods over the part of the ship where they are to be placed, which is determined by the people who have the control of the loading. How far the crane is to be swung, and how much the chain is to be lowered, depends upon what part of the ship the goods are to be placed in, and every act in connection with the working of the crane must be done according to the orders of those who are directing the loading.

\* \* \* The man was bound to work the crane according to the orders and under the entire and absolute control of Jones & Co.”<sup>10</sup>

**§ 129. Liability for servant compulsorily employed.** At common law if a person is compelled by law to accept the service of the first person of a given class who presents himself, as for instance the first pilot who puts out in a tug to an incoming vessel of a class required to have a pilot aboard in coming into a harbor, there is no liability upon the ship owner for damages resulting from the negligence of the pilot so employed.<sup>11</sup> It is held, however, under our admiralty laws, that liability does attach in such cases.<sup>12</sup>

<sup>10</sup> *Donovan v. Laing* (supra).

<sup>11</sup> *The Halley*, L. R. 2, P. C. 193; *Lucey v. Ingram*, 6 M. & W. 302; *Homer Ramsdell Tr. Co. v. La Compagnie Generale Transatlantique*, 21 S. C. Rep. 831.

<sup>12</sup> *The China*, 7 Wall. (U. S.) 53; *Ralli v. Troop*, 157 U. S. 386, 402; *The Barnstable*, 181 U. S. 464.

Of course, if a right of selection exists, even among a limited class, the person selected is as truly the servant of the master as if the freedom of choice were not limited. Thus, where a mining company was required by law to employ a licensed engineer,<sup>13</sup> or a barge was required to employ a licensed barge-man<sup>14</sup> the master was liable for the negligence of a person thus employed.

**§ 130. Liability for crimes of agents or servants.**

If a master has authorized or commanded the commission of a crime he is of course liable criminally with the servant or agent who commits the act. This liability is based not so much upon the doctrine of agency as upon the law of crimes which holds the doer and his accomplice irrespective of any contractual agreement that may have existed between them.

If, however, the master has not authorized or commanded the act, no criminal liability attaches, even though the agent or servant were acting within the scope of employment at the time of the commission of the crime. The presumption of law that every person is innocent until proven guilty protects the master from liability for his servant's crimes, even under circumstances where he would be absolutely liable were the act a mere tort. There are two exceptions to this rule: First, where the master

<sup>13</sup> Consolidated Coal Co. v. Seniger, 179 Ill. 370.

<sup>14</sup> Martin v. Temperley, 4 Q. B. 298.

negligently failed to exercise due control over his servant. Second, where a liability is imposed by statute.

§ 131. **Negligent failure to exercise due control over servant.** If a master employs a servant in a business where in the natural course of the employment crimes may be committed, the master is liable criminally unless he has taken the care that a prudent man would exercise to prevent the happening. In other words, the law imposes upon the master the duty to exercise due control over his servant and failing in this he is liable for the servant's crimes thus negligently committed in his behalf.<sup>15</sup> It should be borne in mind that the master is liable in an action of tort for any wrong committed by the servant in the scope of his employment, but we are now considering the question of criminal liability. There are two classes of cases where the question of the master's criminal liability most frequently arises—libel and nuisance.

Example One: The defendant was the publisher of a newspaper in which appeared a criminal libel against the plaintiff. He alleged in defense that he was unaware of the publication until after it had happened. On suit being brought the defendant was held liable, on the ground that he had not proven

<sup>15</sup> *Commonwealth v. Morgan*, 107 Mass. 199, W. 439; *State v. Mason*, 26 Ore, 273; *Queen v. Stephens*, L. R. 1, Q. B. 702; *Rex v. Medley*, 6 C. & P. 292.

that he had exercised due care to prevent the publication.<sup>16</sup>

Example Two: The defendant was the owner of a quarry. His servants, while acting in the scope of their employment, committed a nuisance by casting rubbish into a public stream. Although he had previously forbidden the act, the court held the defendant liable.<sup>17</sup>

**§ 132. Where liability is imposed by statute.** By the express terms of a statute, usually concerning license or health laws, the proprietors of certain enterprises may be penalized for any misconduct of their business irrespective of whether the act was committed by them personally or by agents or servants.<sup>18</sup>

For example: A statute provided that all bar-rooms must be closed on Sundays. The defendant was the proprietor of a hotel in the jurisdiction. The bar of this hotel was closed on the Sunday in question, but the clerk and one other employee were in the bar-room scrubbing it when a person came in from the street and demanded whiskey. The clerk refused to get it for him and after some discussion the clerk told him that if he was going to get the whiskey to get it and get out as soon as

<sup>16</sup> *Commonwealth v. Morgan* (supra).

<sup>17</sup> *Queen v. Stephens* (supra).

<sup>18</sup> *Noecker v. People*, 91 Ill. 494; *McCutcheon v. People*, 69 Ill. 601; *People v. Roby*, 52 Mich. 577, W. 442; *Carroll v. State*, 63 Md. 551; *Commonwealth v. Kelley*, 140 Mass. 441.

he could. The man helped himself to the whiskey, handed the pay for it to the clerk's assistant and departed. The court held that the defendant was criminally liable.

Said the court: "The statute requires the proprietor at his peril to keep the bar closed. The purpose in doing so is that persons shall not be there within the reach of temptation. The respondent did not keep his bar closed, and he has therefore disobeyed the law. And he has not only disobeyed the law, but the evil which the law intends to guard against has resulted; that is to say, there has been, either with or without his assent—it is immaterial which—a sale of intoxicating liquors to a person who took advantage of the bar being open to enter it."<sup>19</sup>

<sup>19</sup> People v. Roby (*supra*).

## CHAPTER XIV

### LIABILITY OF PRINCIPAL TO THIRD PERSONS—Continued

§ 133. Independent contractors.

§ 134. Exceptions—Safety of premises.

§ 135. Contracting for a nuisance.

§ 136. Duties that cannot be delegated.

**§ 133. Independent contractors.** We have noted in another connection<sup>1</sup> that there is a distinction between servants and independent contractors. In the case of an independent contractor the relation of master and servant does not arise, since the employer contracts not for service but for a certain definite result, and retains no control over the work nor over the workmen employed. All that the employer can require of the contractor is that the completed work shall satisfy the terms of the contract.

Subject to various exceptions, the employer is not liable for the torts or other misconduct of the independent contractor, or of the workmen employed by him.<sup>2</sup>

<sup>1</sup> See § 11.

<sup>2</sup> *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, H7; *Foster v. Wadsworth-Howland Co.*, 168 Ill. 514; *Blake v. Ferris*, 5 N. Y. 48; *Hexamer v. Webb*, 101 N. Y. 377; *Lawrence v. Shipman*, 39 Conn. 586; *Atlanta R. Co. v. Kimberly*, 87 Ga. 161.

§ 134. **Exceptions—Safety of premises.** The law imposes upon every land owner, who actually or impliedly invites others to come upon his premises, the duty of keeping the premises in a safe condition. He cannot excuse himself from liability for injuries occasioned by reason of unsafe premises on the ground that the condition arose from the negligence or misconduct of an independent contractor who was then in exclusive control of the premises. It is accordingly a rule of law that where the owner of premises, which are under his control, employs an independent contractor to do work upon them which from its nature is likely to render the premises dangerous to persons who may come upon them by the express or implied invitation of the owner, the owner is liable.<sup>3</sup>

Example One: The defendants were owners of certain premises on which were situated two tenement houses occupied by tenants. The defendant contracted with C, a contractor and plumber, for the laying of drain pipes from the houses to the sewer, the price for the work to be \$215. C's workmen dug a trench across the yard. The plaintiff, while crossing the yard after dark to call upon one of the defendant's tenants, fell into the trench and was injured. The excavation was not guarded by lights or otherwise. The defendant tried to escape

<sup>3</sup> *Curtis v. Kiley*, 153 Mass. 123; *Stewart v. Putnam*, 127 Mass. 403; *Woodman v. Metropolitan R. R.*, 149 Mass. 335; *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124.

liability on the ground that he had retained no control over the work or its manner of performance. The court held the defendant liable.<sup>4</sup>

Example Two: The defendant was the owner of a dwelling house, and he maintained in front of his house a hanging lamp that projected over the highway. The plaintiff was injured by the fall of the lamp. The defendant tried to escape liability on the plea that the lamp fell by reason of imperfect repairs made upon it by a contractor whom he had employed to repair it some months before. The court held that the defendant was liable, on the ground that one who maintains a lamp thus projecting, for his own convenience, is bound so to maintain it that it will not be dangerous to passers by.<sup>5</sup>

**§ 135. Exceptions — Contracting for a nuisance.** Another instance in which the employer will not be allowed to escape liability under the “independent contractor” rule is where the act contracted for is in itself a nuisance. This does not mean that if the contractor unwisely or negligently adopts a mode of performance that results in nuisance that the employer will be liable,<sup>6</sup> but rather that if the terms of the contract call for an act that is a nuisance the employer is liable.

For example: The defendant railroad engaged

<sup>4</sup> *Curtis v. Kiley* (supra).

<sup>5</sup> *Tarry v. Ashton*, 1 Q. B. D. 314.

<sup>6</sup> *Boomer v. Wilbur*, 176 Mass. 482, H. 600; *Connors v. Hennessey*, 112 Mass. 96; *Engel v. Eureka Club*, 137 N. Y. 100.

an independent contractor to lay an additional track in some of the streets of Boston. A trench had been excavated through Adams Square and a barrier had been erected, but the ends of some of the rails projected beyond the barrier. The plaintiff's testator, who was at the time an old man, was injured by falling over the projection in the darkness. The court held that notwithstanding the employment of an independent contractor the defendant was liable.

"Laying the track for the defendant," said the court, "necessitated the digging up of the highway, and the obstruction of it with earth and materials. This obstruction would be a nuisance unless properly guarded against. The work was done under a permit issued to the defendant. Considering the general principle of the law, and also the special relation of horse railroads to the highway, and the policy of the statutes, so far as the legislature has expressed itself upon the subject, we are of the opinion that the defendant, having caused the highway to be obstructed, was bound at its peril to see that a nuisance was not created."<sup>7</sup>

**§ 136. Exceptions — Duties that cannot be delegated.** If a duty has been imposed upon an employer, either by positive law or by contract agreement, he cannot escape liability for the faithful per-

<sup>7</sup> Woodman v. Metropolitan R. R., 149 Mass. 335.

formance of such duty by employing an independent contractor.

Example One: The defendant had been empowered by statute to construct a bridge. It employed an independent contractor to do the work. The statute stipulated upon penalty that the bridge must be open for navigation within a specified time, but owing to the failure of the contractor to live up to the terms of his contract the defendant was unable to comply with the statute. The court held that he was liable.<sup>8</sup>

Example Two: The defendant contracted with a city to lay water pipes, and agreed with the city to protect all persons from damage in the process of the work and to be responsible for any damage that might arise. The defendant sub-let the work to an independent contractor. One of the contractor's employees, in operating a steam drill, injured the plaintiff. The court held that the defendant was liable.<sup>9</sup>

<sup>8</sup> *Hole v. Sittingbourne R. Co.*, 6 H. & N. 488; see also *Downey v. Low*, 22 N. Y. App. Div. 460; *Reuben v. Swigart*, 7 Oh. Dec. 638; *Denning v. Terminal Ry. Co.*, 49 N. Y. App. Div. 493.

<sup>9</sup> *Water Co. v. Ware*, 16 Wall. 566; but see *Blake v. Ferris*, 5 N. Y. 48.

## CHAPTER XV

### RIGHTS OF PRINCIPAL AGAINST THIRD PARTIES

§ 137. In contract.

§ 138. Defenses open to third party.

§ 139. Right to rescind contract in case of collusion.

§ 140. In tort.

§ 141. Right to recover damages for collusion.

§ 142. Right to recover damages for injury to agent, etc.

**§ 137. In contract.** Every contract entered into in the principal's behalf by an agent, whether the agent had authority at the time to make such a contract, or whether the principal afterward ratified the same, confers upon the principal the same rights as though he had acted in person. He may, therefore, hold the third party strictly accountable for every material condition of the contract. This is true even though the principal was not disclosed when the contract was made, the third party supposing that the agent was acting for himself.<sup>1</sup>

For example: Plaintiff sued the defendant for the price of a certain quantity of hemlock bark. It

<sup>1</sup> *Huntington v. Knox*, 7 Cush (Mass.) 371, M. 587; *Milliken v. W. U. Tel. Co.*, 110 N. Y. 403, 1 L. R. A. 281; *Harkness v. W. U. Tel. Co.*, 73 Iowa 190, 5 Am. St. Rep. 672; *Kingsley v. Liebrecht*, 92 Me. 23, 43 Atl. Rep. 249, 69 Am. St. Rep. 486; see § 109 ante.

appeared that the sale had been made by one G, the agent of the plaintiff, by her authority. The contract was made in writing by G in his own name without disclosing the fact of his being agent for another in the transaction. Upon suit being brought, the defendant objected to the introduction of oral evidence to establish the fact that she was the principal in the transaction, and also contended that the plaintiff could not sue upon the contract in her own name. But the court held for the plaintiff on both points.

Said the court: "The defendant, by accepting it (a written receipt of part payment for the bark), admits the sale and its terms; but the law raises the promise of payment. And this is by implication, *prima facie*, a promise to the agent; yet it is only *prima facie* and may be controlled by parol evidence that the contract of sale was for the sale of property belonging to the plaintiff, and sold by her authority to the defendant by the agency of the person with whom the defendant contracted." <sup>2</sup>

**§ 138. Defenses open to third party.** We have already seen that if the contract between the third party and agent of an undisclosed principal is a contract under seal,<sup>3</sup> or a negotiable instrument,<sup>4</sup> the undisclosed principal cannot be held upon it.

<sup>2</sup> *Huntington v. Knox* (supra).

<sup>3</sup> § 184.

<sup>4</sup> § 185.

The reverse is also true—the undisclosed principal cannot acquire rights under such contracts.

The undisclosed principal's rights under a contract are only such rights as the agent ostensibly possessed at the time the principal disclosed his identity to the third party. If, therefore, the latter has settled with the agent, or made a partial payment, or possesses any right of set-off against the agent, he will be allowed to set up these defenses in any action brought by the principal. But the third party must have acted in good faith and without knowledge of the existence of the principal.<sup>5</sup>

For example: S was, to the knowledge of the defendant, a commission broker who sold fruit and produce for others, but who also carried on a fruit and produce business of his own. The defendant was a dealer on his own account in the same city. The plaintiffs, who resided in a distant city, had for years shipped fruit and produce to S to be sold by him in their behalf. In August, 1896, they shipped him a consignment of fruit. S sold the fruit to the defendant on August 21. There was no express agreement between S and the defendant for any credit, but the purchase price was not paid at the time of sale, it being the custom of dealers in that city to settle accounts between themselves weekly.

<sup>5</sup> *Gardner & Sager v. Allen's Executor*, 6 Ala. 187, R. 455; *Ruan v. Gunn*, 77 Ga. 53; *Quinn v. Sewell*, 50 Ark. 380; *Sellers & Co. v. Malone-Pilcher Co.*, 151 Ala. 426; *Baxter v. Sherman*, 73 Minn. 434, R. 457.

On August 22, S and the defendant had a settlement, in which the price of the plaintiff's fruit was applied upon a debt due from S to the defendant. This debt had no connection with the sale of the plaintiff's fruit. On August 26 S made an assignment for the benefit of his creditors. The plaintiffs, not being paid for their fruit, brought suit against the defendant. The defendant tried to set up in defense that he had already settled with the plaintiff's agent, but the court held for the plaintiff.

"Defendant had sufficient information," said the court, "to advise him that it was quite as likely that Shea was acting as a factor as that he was acting for himself. This was of itself enough to put him upon inquiry, not as to Shea's authority to sell, but as to his own right of set-off if he desired to buy with a view of covering his own debt or availing himself of a set-off. Presumably, if he had inquired of Shea he would have been informed that Shea was acting merely as an agent for another. Should Shea have refused to inform him whether he was acting for himself or for a principal, defendant might have declined to make the purchase. Knowing what he did, and having entered into the transaction without inquiry, defendant could have had no honest or reasonable belief one way or the other as to the ownership of the property; and under these circumstances he can have no right, as against the demand of the plaintiffs, to insist upon set-off or upon the

attempted application of the purchase price of their fruit on his claim against Shea.”<sup>6</sup>

**§ 139. Right to rescind contract in case of collusion.** If the other party to the contract has attempted to overreach the principal by collusion with the agent, or by procuring the agent to betray his principal's interests through promise of a commission or other advantage from the transaction, the principal may, upon discovering the facts, rescind the contract.

An agent while in the employ of a principal in a given transaction cannot legally receive payment from the other party to the transaction unless the principal is aware of the arrangement and offers no objection at the time. The other party is bound to know this and he cannot, therefore, complain if the principal annuls the contract. The principal must act promptly, however, for if the rights of innocent third parties have intervened the right of rescission is lost.<sup>7</sup>

**§ 140. Rights of principal against third parties—In tort.** Where property or money has been entrusted to an agent by a principal, and a third party obtains the same through any questionable transaction with the agent, the principal may compel the

<sup>6</sup> *Baxter v. Sherman* (supra).

<sup>7</sup> *New York Cent. Ins. Co. v. National Ins. Co.*, 14 N. Y. 85; *U. S. Rolling Stock Co. v. Atlantic R. Co.*, 34 Ohio St. 450, 32 Am. Rep. 380.

third party to restore it. In other words, the principal may follow and regain any property wrongfully disposed of by the agent, unless it has come into the hands of a bona fide holder for value. Even though the property has become changed in form, the principal may nevertheless recover it if he can establish that it is the proceeds of the very property of which he has been wrongfully deprived.<sup>8</sup>

**§ 141. Right to recover damages for collusion.**  
The principal also has the right to recover damages from a third person who has colluded with his agent to defraud him; or he may set up in defense such collusion to defeat an action against him by the third person.<sup>9</sup>

For example: S was a member of the water board of the City of Boston, which board was authorized to purchase a site for the construction of a reservoir. W and S entered into an agreement that if S would give W advance information as to the site selected by the board of which he was a member, W would purchase the land and resell it to the city, with S's

<sup>8</sup> *Thompson v. Barnum*, 49 Iowa 392, H. 497; *Farmers Bank v. King*, 57 Pa. 202, 98 Am. Dec. 215, M. 590; *Van Alen v. Am. Nat. B.*, 52 N. Y. 1; *Baker v. N. Y. Bank*, 100 N. Y. 31, 53 Am. Rep. 150, M. 596; *Roca v. Byrne*, 145 N. Y. 182, 39 N. E. Rep. 812; *McLeod v. Evans*, 66 Wis. 401; *Dorrah v. Hill*, 73 Miss. 787, 19 So. 961, 32 L. R. A. 631; *Gilman Oil Co. v. Norton*, 89 Iowa 434, 56 N. W. Rep. 663; *Peak v. Ellicott*, 30 Kans. 156.

<sup>9</sup> *Boston v. Simmons*, 150 Mass. 461, M. 598; *Mayor v. Lever*, 1891, 1 Q. B. 168, M. 601; *Hegenmeyer v. Marks*, 37 Minn. 6; *Findlay v. Peitz*, 66 Fed. Rep. 427; *Miller v. R. R. Co.*, 83 Ala. 274.

assistance, and that the two should share the profits. The arrangement was carried out according to schedule and W and S divided the profits. The facts became known and the city brought suit against W and S jointly. The court held that they were liable to the city for the damage sustained.<sup>10</sup>

**§ 142. Right to damages for injury to agent, or for interference with his service.** The principal has a right to the uninterrupted continuance of the service of an agent or servant. A person who injures the latter so as to prevent the performance of his customary duties has committed a wrong against the principal and is, therefore, liable to him in damages. The same rule prevails where a third person maliciously induces an agent or servant to break his contract of service.<sup>11</sup>

Example One: The plaintiff was a manufacturer of boots and shoes, and as such employed many workmen. The defendant, with knowledge of these facts, wilfully induced the plaintiff's workmen to leave his employ, thereby causing the plaintiff much damage. Upon suit being brought the court held that the defendant was liable.<sup>12</sup>

<sup>10</sup> *Boston v. Simmons* (supra).

<sup>11</sup> *Walker v. Cronin*, 107 Mass. 555; *Ames v. Union Ry. Co.*, 117 Mass. 541; *St. Johnsbury R. R. Co. v. Hunt*, 55 Vt. 570, 45 Am. Rep. 639, M. 608; *O'Neil v. Behanna*, 182 Pa. 236, 37 Atl. Rep. 843; *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780; *Doremus v. Hennessy*, 176 Ill. 608, 52 N. E. Rep. 924, 68 Am. St. Rep. 203.

<sup>12</sup> *Walker v. Cronin* (supra).

Example Two: The plaintiff's apprentice, while riding on the horse cars of the defendant company, was so badly injured in a collision with a team that it became necessary to amputate his leg. The plaintiff sued the defendant for the injury that had resulted to him through the loss of services of his apprentice. The court held that the plaintiff could recover.<sup>13</sup>

<sup>13</sup> Ames v. Union Ry. Co. (supra).

## CHAPTER XVI

### LIABILITY OF PRINCIPAL TO AGENT OR SERVANT

- § 143. For compensation.
- § 144. Amount of.
- § 145. When payable.
- § 146. In case of wrongful termination of agency by principal.
- § 147. In case of wrongful termination of agency by agent.
- § 148. Agent's discharge for cause.
- § 149. Termination by operation of law.
- § 150. Reimbursement of agent.
- § 151. Indemnification of agent.
- § 152. When acts are unlawful.
- § 153. Liability of principal to agent, in tort.
- § 154. For breach of non-assignable duties.
- § 155. For torts of superintendent or vice principal.
- § 156. The fellow servant rule.
- § 157. Employers' liability acts.

**§ 143. For compensation.** The agent's right to compensation for services rendered in his principal's behalf is of course a fundamental right. Whenever one person requests another to render a service for him, unless that person is a member of his own family,<sup>1</sup> or the circumstances are such that no reasonable man would expect to be paid for the act,<sup>2</sup>

<sup>1</sup> Harris v. Smith, 79 Mich. 54, 6 L. R. A. 702; Murphy v. Murphy, 1 S. Dak. 316, 9 L. R. A. 820.

<sup>2</sup> Chadwick v. Knox, 31 N. H. 226, 64 Am. Dec. 329; Wood v. Ayres, 39 Mich. 345, 33 Am. Rep. 396.

the law will imply a promise to pay, even though no promise is actually made.<sup>3</sup> Ratification of an unauthorized act entitles the agent to the same rights of compensation that he would have possessed had the act been duly authorized at the time of performance.<sup>4</sup>

For example: The defendant, who was the city marshal of Portsmouth, desired to arrest W. The plaintiff rendered necessary and valuable services in accomplishing it, as the defendant's agent, although without authority from the defendant. Later, the defendant, with full knowledge of the facts, ratified the services and promised to pay for them. Upon suit being brought, the court held that the plaintiff could recover.

Said the court: "If a person acts as an agent, without authority, and the principal after full knowledge of the transaction ratifies it, it will be his act, the same as if he had originally given the authority; and the agent will be entitled to the same rights and remedies, and to the same compensations, as if he had acted within the scope of an acknowledged original authority."<sup>5</sup>

**§ 144. The amount of compensation.** The amount of compensation is determined if possible from the contract itself; but if the contract contains no pro-

<sup>3</sup> *Bradford v. Kimberly*, 3 John. Ch. 431, M. 523.

<sup>4</sup> *Wilson v. Dame*, 58 N. H. 392, M. 526.

<sup>5</sup> *Wilson v. Dame* (supra).

visions as to the amount, the law will imply a promise to pay a reasonable sum, or the sum usually paid for services of like character.<sup>6</sup>

**§ 145. When payable.** Compensation is payable at the time set by the contract, but, if the contract is silent on that point, payment will become legally due upon the completion of the work. Since the law aims to recompense the agent for his labors in his principal's behalf, it matters not that the principal neglects or refuses to avail himself of the benefits to be derived therefrom. He is nevertheless liable to the agent in the same measure as though he had profited thereby.<sup>7</sup>

For example: The defendant appointed the plaintiff as his agent to procure a loan and promised to pay him 5% commission on the amount of the loan obtained. Formal application was made for the loan. The parties to whom it was made agreed to lend the amount requested. The plaintiff notified the defendant that his proposition for a loan had been accepted, and gave him a form of mortgage to execute. The paper was taken by the defendant,

<sup>6</sup> *Miller v. Cuddy*, 43 Mich. 273, 38 Am. Rep. 181, *Eggleston v. Boardman*, 37 Mich. 14; *McCrary v. Ruddick*, 33 Iowa 521; *Bowen v. Bowen*, 74 Ind. 470; *Johnson v. Thompson*, 72 Ind. 167, 37 Am. Rep. 152.

<sup>7</sup> *Vinton v. Baldwin*, 88 Ind. 104; *Wilson v. Mason*, 158 Ill. 304, 42 N. E. 134, 49 Am. St. Rep. 162; *Gelatt v. Ridge*, 117 Mo. 553, 23 S. W. 882; *Barthell v. Peter*, 88 Wis. 316, 60 N. W. 429; *Wray v. Carpenter*, 16 Colo. 271, 27 Pac. 248; *Green v. Lucas*, 33 L. T. (N. S.) 584; *Lane v. Albright*, 49 Ind. 275; *Moses v. Bierling*, 31 N. Y. 462; *Mooney v. Elder*, 56 N. Y. 238.

who promised to have it duly executed and acknowledged. On the next day the plaintiff notified the defendant that the money was ready for him, but he refused to accept the loan or to pay the plaintiff for his services. Upon suit being brought the court held that the plaintiff could recover the stipulated commission.

“His right to commission,” said the court, “does not depend upon the contingency of the applicant’s acceptance of the loan, but upon his performance of his part of the contract. The principal cannot deprive the broker of his commission by refusing to accept the loan which the negotiations of the latter have resulted in securing.”<sup>8</sup>

**§ 146. — In case of wrongful termination of agency by principal.** If the agency is for an indefinite period, subject to termination at the will of either party, the principal may of course revoke the agency without incurring liability for damages. The agent can collect merely for such services as he may have rendered during the period of his employment. If, however, the principal wrongfully revokes the agent’s authority before the expiration of his term of service the principal thereby incurs liability for damages for breach of contract, in addition to any sums then payable to the agent for services rendered.<sup>9</sup>

<sup>8</sup> Vinton v. Baldwin (*supra*).

<sup>9</sup> Cutter v. Gillette, 163 Mass. 95, H. 222; Sutherland v. Wyer, 67

For example: The plaintiff was engaged by the defendant for a period of five years, but was wrongfully discharged after three months' service. Plaintiff brought suit for damages up to the time of the trial and for the remainder of the five-year period. The court held that he could recover.

"The plaintiff's cause of action," said the court, "accrued when he was wrongfully discharged. His suit is not for wages, but for damages for the breach of his contract by the defendant. For this breach he can have but one action. In estimating his damages the jury have the right to consider the wages which he would have earned under the contract, the probability whether his life and that of the defendant would continue to the end of the contract period, whether the plaintiff's working ability would continue, and any other uncertainties growing out of the terms of the contract, as well as the likelihood that the plaintiff would be able to earn money in other work during the time (i. e., the time that elapsed after his discharge to the end of the contract period). \* \* \* The liability to have the damages which he inflicts by breaking his contract so assessed is one which the defendant must be taken to have understood when he wrongfully discharged

Me. 64, H. 224; *Glover v. Henderson*, 120 Mo. 367, H. 226; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285, M. 526; *Olmstead v. Bach*, 78 Md. 132, 27 Atl. Rep. 501, 44 Am. St. Rep. 273; *Hamilton v. Love*, 152 Ind. 641; 71 Am. St. Rep. 384; *James v. Allen Co.*, 44 Ohio St. 226, 48 Am. Rep. 821; *Boland v. Glendale Quarry Co.*, 127 Mo. 520, 30 S. W. Rep. 151.

the plaintiff, and, if he did not wish to be subjected to it, he should have kept his agreement.”<sup>10</sup>

**§ 147. Wrongful termination by agent.** If the agency is capable of termination upon notice from either party, the agent may exercise his right to terminate the contract and still recover whatever compensation may be due him under the contract at the time he quits the employment. If, however, an agent wrongfully abandons his employment he forfeits any wages or salary that may have been due him at the time.<sup>11</sup> Some jurisdictions, however, permit the agent to recover in *quantum meruit*, after a deduction of such damages as may have resulted from the breach.<sup>12</sup>

**§ 148. — Agent's discharge for cause.** If the agent has violated the actual or implied terms of his employment, the principal may of course discharge him summarily. If his misconduct is grave, such as gross negligence, bad faith or fraud, he is usually held to forfeit any compensation that would other-

<sup>10</sup> *Cutter v. Gillette* (supra).

<sup>11</sup> *Miller v. Goddard*, 34 Me. 102, 56 Am. Dec. 638; *Davis v. Maxwell*, 12 Metc. (Mass.) 286, H. 236; *Stark v. Parker*, 2 Pick (Mass.) 267, 13 Am. Dec. 425; *Olmstead v. Beale*, 19 Pick (Mass.) 528; *Thrift v. Payne*, 71 Ill. 408; *Hansell v. Erickson*, 28 Ill. 257; *Peterson v. Mayer*, 46 Minn. 468, 49 N. W. 245, 13 L. R. A. 72; *Diefenback v. Stark*, 56 Wis. 462, 14 N. W. 621, 43 Am. Rep. 719, R. 545.

<sup>12</sup> *Timberlake v. Thayer*, 71 Miss. 279, H. 235, R. 543; *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713; *McClay v. Hedge*, 18 Iowa 66; *Parcell v. McComber*, 11 Neb. 209, 7 N. W. 529.

wise have been due him at the time of his discharge.<sup>13</sup> If, however, his misconduct is slight or capable of explanation, and the principal has derived a substantial benefit from the agent's services, the latter may recover in *quantum meruit*, deducting, however, the damages that the principal may have sustained by reason of the said misconduct.<sup>14</sup>

**§ 149. — When agency is terminated by operation of law.** If an agency is terminated by operation of law, such as by reason of death or insanity of the agent, his estate may collect whatever compensation may be due him at the time.<sup>15</sup> In case of death or insanity of the principal the agency would likewise terminate, but the principal's estate is not liable for damages or for anything beyond the amount due the agent at the time.<sup>16</sup> The same is true if the agency is terminated by reason of an order of court of the jurisdiction enjoining the principal from continuing his business.<sup>17</sup>

<sup>13</sup> Dodge v. Tileston, 12 Pick (Mass.) 328; Fisher v. Dynes, 62 Ind. 348; Bledsoe v. Irvin, 35 Ind. 293; Wadsworth v. Adams, 138 U. S. 380; Blair v. Shaeffer, 33 Fed. 218; Urquhart v. Mortgage Co., 85 Minn. 69, 88 N. W. 264; McGon v. Adams, 65 Ala. 106; Fish v. Seeberger, 154 Ill. 30, 39 N. E. 982; Sampson v. Iron Works, 6 Gray (Mass.) 120.

<sup>14</sup> Jones v. Hoyt, 25 Conn. 374; Lee v. Clements, 48 Ga. 128; Wadsworth v. Adams, 138 U. S. 380.

<sup>15</sup> Patrick v. Putnam, 27 Vt. 759; Wolfe v. Howes, 20 N. Y. 197, 75 Am. Dec. 388.

<sup>16</sup> Griggs v. Swift, 82 Ga. 392, 5 L. R. A. 405, M. 537.

<sup>17</sup> People v. Globe Mutual Ins. Co., 91 N. Y. 174, M. 232.

§ 150. **Reimbursement of agent.** If in the course of the agent's duties it has become necessary for him to advance money out of his own pocket for expenses or disbursements, he has a right to recover such sums from his principal, provided he has acted prudently and honestly in making such disbursements.<sup>18</sup> But in order to entitle the agent to recover he must have had either actual or implied authority to make the expenditures in question.<sup>19</sup> If, therefore, the expenditure became necessary because of his own negligence or breach of duty he has no right to be reimbursed by his principal.<sup>20</sup>

§ 151. **Indemnification of agent.** A similar rule prevails in regard to indemnification of the agent against losses and liabilities resulting from the due performance of his duties. When the relation of agency is entered into, and the duties imposed upon the agent are legitimate and of such a nature as would by possibility incur personal loss or liability, the law implies a promise on the part of the principal to indemnify his agent for any such loss or liability.<sup>21</sup>

<sup>18</sup> *Bibb v. Allen*, 149 U. S. 481; *Rosenstock v. Tormey*, 32 Md. 169, 3 Am. Rep. 125; *Ruffner v. Hewitt*, 7 W. Va. 585; *Armstrong v. Pease*, 66 Ga. 70; *Moore v. Appleton*, 26 Ala. 633, R. 558; *Maitland v. Martin*, 86 Pa. St. 120, 561.

<sup>19</sup> *Barron v. Fitzgerald*, 6 Bing. (N. C.) 201; *Keyes v. Inhabitants of Westford*, 17 Pick (Mass.) 273.

<sup>20</sup> *Lewis v. Samuel*, 8 Q. B. 685; *Veltum v. Koehler*, 85 Minn. 125, 88 N. W. 432; *Brown v. Clayton*, 12 Ga. 574.

<sup>21</sup> *Hooper v. Treffey*, 1 Exch. 17; *Cropper v. Cook*, L. R. 8 C. P. 199; *Bibb v. Allen*, 149 U. S. 481, 37 L. Ed. 819; *Saveland v. Green*, 36

**Example One:** The plaintiff as agent of defendant sold goods under his instructions, believing them to be the property of the defendant. The goods were not the goods of the defendant and the plaintiff was obliged to pay to the true owner the value of the goods. The plaintiff now sues the defendant for indemnification. The court held that he could recover.<sup>22</sup>

**Example Two:** The plaintiff as agent of the defendant sold cotton on the latter's account, but because of false packing of the cotton by the defendant the plaintiff was obliged to refund to the purchaser the price of the cotton. The court held that the plaintiff could recover indemnity from the defendant.<sup>23</sup>

**§ 152. — When acts are unlawful.** If the agent's losses or liabilities are occasioned by unlawful acts, even though authorized or commanded by the principal, no right of indemnity or reimbursement exists. The law leaves the parties where they have placed themselves. Illustrations are seen in case of sale of public offices,<sup>24</sup> corruption in securing govern-

Wis. 612; *Denny v. Wheelwright*, 60 Miss. 733; *Maitland v. Martin*, 86 Pa. 120; *Powell v. Trustees*, 19 Johns. (N. Y.) 284; *Greene v. Goddard*, 9 Metc. (Mass.) 212; *Beach v. Branch*, 57 Ga. 362; *Drummond v. Humphries*, 39 Me. 347.

<sup>22</sup> *Adamson v. Jarvis*, 4 Bing. 66.

<sup>23</sup> *Beach v. Branch*, 57 Ga. 362.

<sup>24</sup> *Stackpole v. Earle*, 2 Wils. 133; *Waldo v. Martin*, 4 B. & C. 319.

ment contracts,<sup>25</sup> lobbying<sup>26</sup> and combinations to corner the market.<sup>27</sup>

**§ 153. Liability of principal to agent in tort.** If an agent or servant is injured by reason of the fault of the principal, a right of action arises precisely as though the wrong had been committed against a third party. We shall see that upon entering a given employment an employee is presumed by law to assume certain risks incident to the employment, but the risk of injury by reason of the tort of the employer is never included among such risks. It matters not whether the principal is acting at the time in his capacity as principal, or whether he is working as a fellow laborer with the person injured, the liability is the same.<sup>28</sup>

**§ 154. Liability for breach of non-assignable duties.** The law imposes upon an employer of labor certain duties which he cannot delegate to others, and thus escape liability for their non-performance. He is liable for any injury to his employees by reason of such non-performance, whether the same was due to his own fault, or to the fault of some one to

<sup>25</sup> *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539; *Elkhart County Lodge v. Crary*, 98 Ind. 238, 49 Am. Rep. 746; *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 145, 17 L. Ed. 868.

<sup>26</sup> *Trist v. Child*, 21 Wall. (U. S.) 441, 22 L. Ed. 623; *McBratney v. Chandler*, 22 Kans. 692, 31 Am. Rep. 213.

<sup>27</sup> *Samuels v. Oliver*, 130 Ill. 73, 22 N. E. 499.

<sup>28</sup> *Lorentz v. Robinson*, 61 Md. 64.

whom he had entrusted the performance of them. Such duties are therefore personal and non-assignable. Chief among them are the following—duty to provide a safe place to work, and safe instrumentalities;<sup>29</sup> to provide a sufficient number of competent workmen;<sup>30</sup> to provide proper rules and regulations of service,<sup>31</sup> and suitable supervision of the service.<sup>32</sup>

**§ 155. — For torts of a superintendent or vice principal.** If a principal has appointed one of his employees to act as a foreman, superintendent or vice-principal he will be liable for the torts committed by such person against any of his other employees precisely as though he had committed them in person, provided such torts grew out of the delegated duties.

In performing the delegated duties, a foreman or superintendent is the personal representative of the principal and subjects the latter to all the penalties growing out of his misconduct. But if the foreman or superintendent is himself at the time of the al-

<sup>29</sup> *Ford v. Fitchburg R. R.*, 110 Mass. 240; *English v. Amidon*, 72 N. H. 301, H. 743; *Madigan v. Oceanic Co.*, 178 N. Y. 242, H. 746; *Murphy v. Boston & A. R. R.*, 88 N. Y. 146, H. 752; *Fuller v. Jewett*, 80 N. Y. 46, H. 749.

<sup>30</sup> *Flike v. Boston & A. R. R.*, 53 N. Y. 549, H. 737; *Coppins v. New York Central R. R.*, 122 N. Y. 557; *Wabash R. R. v. McDaniels*, 107 U. S. 454; *Maloy v. Electric Light Co.*, 41 N. Y. App. Div. 574, H. 740.

<sup>31</sup> *Abel v. Delaware & H. C. Co.*, 103 N. Y. 581, H. 765; *Eastwood v. Retsof Mining Co.*, 86 Hun. (N. Y.) 91, H. 767.

<sup>32</sup> *Whittaker v. D. & H. C. Co.*, 126 N. Y. 544; *Wabash R. R. v. McDaniels*, 107 U. S. 454.

leged tort in the performance of an operative act, the law in most jurisdictions regards him as a fellow servant of the injured employee and, as we shall see in the next section, exempts the master from liability. The character of the act is, therefore, the usual test of the principal's liability. If the wrong arises from the performance of a non-assignable duty the master is liable. If, however, it arose from the performance of an act such as any ordinary employee might perform there is no liability.<sup>33</sup>

For example: The plaintiff was a laborer in the defendant's iron works. While the plaintiff with others was employed in lifting the flywheel of an engine off its center, the superintendent of the works, Babbitt, carelessly let the steam on and started the flywheel, throwing plaintiff on the gearing wheels, thus occasioning serious injuries. Upon suit being brought the court held that the defendant was not liable.

"The liability of the master," said the court, "does not depend upon the grade or rank of the

<sup>33</sup> *Moody v. Hamilton Mfg. Co.*, 159 Mass. 70, 30 Am. St. 396; *Blake v. Maine Central*, 70 Me. 60, 35 Am. Rep. 297; *Coal Co. v. Peterson*, 136 Ind. 398, 43 Am. St. 327; *Ross v. Walker*, 139 Pa. St. 42, 23 Am. St. 160; *Norfolk, etc., R. R. v. Hoover*, 79 Md. 253, 47 Am. St. 392; *Crispin v. Babbitt*, 81 N. Y. 516, H. 731; *Fuller v. Jewett*, 80 N. Y. 46; *Kimmer v. Weber*, 151 N. Y. 417; *O'Brien v. Am. Dredging Co.*, 53 N. J. L. 291, R. 624; *Darrigan v. N. Y., etc., R. R.*, 52 Conn. 285, 52 Am. Rep. 590; *Beesley v. Wheeler, etc., Co.*, 103 Mich. 196; *Brown v. Winona, etc., R. R.*, 27 Minn. 162, 38 Am. Rep. 285; *Dwyer v. Am. Express Co.*, 82 Wis. 307, 33 Am. St. 44, R. 630; *McBride v. Union Pac. R. R.*, 3 Wyo. 183, 21 Pac. 687; *Anderson v. Bennett*, 16 Or. 515, 8 Am. St. 311.

employee whose negligence causes the injury. A superintendent of a factory, although having power to employ men, or represent the master in other respects, is, in the management of the machinery, a fellow servant of the other operatives.”<sup>34</sup>

**§ 156. The fellow servant rule.** Although the rule is unquestioned that a master is liable for torts of his servants committed within the scope of their employment, yet this rule applies only in behalf of persons who are not in the employ of the master. At common law, if one servant was injured by reason of the tort of a fellow servant engaged in the same common employment, the principal was not liable<sup>35</sup> unless the fellow servant was at the time acting as a vice-principal in the performance of non-assignable duties of the master,<sup>36</sup> or unless the master has negligently selected an incompetent fellow servant,<sup>37</sup> or unless a liability has been imposed upon the master by statute.<sup>38</sup> The theory upon which the

<sup>34</sup> *Crispin v. Babbitt* (supra). The courts of some jurisdictions do not follow this doctrine, however, and hold that the negligence of a superintendent or vice principal is the negligence of the principal irrespective of the character of the act itself. *Electric Light Co. v. Baldwin*, 62 Neb. 180, H. 725; *Berea Stone Co. v. Kraft*, 31 Oh. State 287.

<sup>35</sup> *Farwell v. Boston & W. R. R.*, 4 Metc. (Mass.) 49, 38 Am. Dec. 339; *Coombs v. New Bedford Cord. Co.*, 102 Mass. 572; *Chicago, etc., R. R. v. Kneirin*, 152 Ill. 458, 43 Am. St. 259; *Schaub v. Hannibal, etc., R. R.*, 106 Mo. 74.

<sup>36</sup> See previous section.

<sup>37</sup> *Coppins v. New York Cent. R. R.*, 122 N. Y. 557; *Cameron v. New York Cent. R. R.*, 145 N. Y. 400.

<sup>38</sup> See post section 157.

doctrine is based has been well stated by Chief Justice Shaw in the case of *Farwell v. Boston & Worcester Railroad*: "One who enters the service of another takes upon himself the ordinary risks of the employment in which he engages, including the negligent acts of his fellow workmen in the course of the employment."

The mere fact that two servants are in the employ of the same master will not render them "fellow servants" within the meaning of the rule. They must be employed in a *common service*, although not necessarily at the same or similar tasks. Thus, a track repairer and a train man employed by the same railroad company have been held to be fellow servants.<sup>39</sup>

§ 157. **Master's liability by statute—Employers' Liability Acts.** Legislation in recent years has done much to enlarge the rights of the workingman as against his employer, and especially to moderate the harshness of the fellow servant doctrine. Laws bearing upon this phase of our subject are known as "Employers' Liability Acts." The first Employers' Liability Act was passed in England in 1880<sup>40</sup> and many states of our own country have enacted acts very similar in their provisions. While it is not within the scope of this volume to enter

<sup>39</sup> *Coon v. Syracuse, etc., R. R.*, 5 N. Y. 492; *contra*, *Chicago, etc., R. R. v. Moranda*, 93 Ill. 302.

<sup>40</sup> 43 and 44 Vict. C. 42.

into an elaborate exposition of Employers' Liability Acts, yet some features common to all of them may well be noted.

*Ways, works and machinery.* For any injury caused by a defect in the condition of ways, works or machinery used in the business of the master, whether such defect was due to the negligence of the master or of some other person whose duty it was to inspect and maintain them, the master is liable.

*Negligence of foreman, etc.* If negligence of one under whose orders the injured party was acting was responsible for the injury the master is liable.

*Obedience to rules, etc.* If the injury resulted from acts or omissions of any person made in obedience to rules or regulations of the master, or in obedience to orders of agents duly authorized in that behalf, the master is liable.

*Negligence of switch-tender, etc.* If the injury arises from the negligence of a person in charge or control of signals, switches, engines or trains upon a railroad the master is liable.

The foregoing are the main provisions of the statutes so far as they concern the fellow servant rule. It will be observed that the common law defense of the fellow servant rule is abolished in the cases enumerated, but the master still has the right to show contributory negligence of the injured party, or failure to notify the master of threatened danger where such notification was possible. The statutes

usually provide that, after an accident covered by the statute, notice must be given to the master within a certain number of days, of the time, place and cause of the injury; and that an action for damages must be brought, if at all, within a time set by the statute.

## CHAPTER XVII

### RIGHTS OF PRINCIPAL AGAINST AGENT OR SERVANT

§ 158. In general.

§ 159. For failure to obey instructions.

§ 160. When failure to obey is justified.

§ 161. For failure to exercise skill, care and diligence.

§ 162. For failure to exercise good faith.

§ 163. For failure to give notice.

§ 164. Right of principal to accounting.

§ 158. **In general.** Since the relation of agency arises from a contract between the principal and the agent, the duties of the agent depend upon the actual or implied terms of the contract. It is of course an obvious right of the principal to insist that the agent properly fulfill his duties, and to hold him responsible in damages for any failure so to do. If the agent is a paid agent, the principal has a right against him for any damages that may result from either misfeasance or non-feasance.<sup>1</sup> If, however, the agent offers his services gratuitously and then

<sup>1</sup> *Gilson v. Collins*, 66 Ill. 136; *Mobile, etc., R. R. v. Clanton*, 59 Ala. 392; *Page v. Wells*, 37 Mich. 415; *Challiss v. Wylie*, 35 Kans. 506; *Oceanic, etc., Co. v. Compania, etc., Espanola*, 134 N. Y. 461; *Grand Trunk R. R. v. Latham*, 63 Me. 177; *Green v. New River Co.*, 4 T. R. 589; *Savage v. Walthers*, 11 Mod. 135.

neglects or refuses to perform, there is no liability, however greatly the principal may have been damaged by such failure to perform.<sup>2</sup> It is a mere non-feasance, and since there is no consideration for the gratuitous promise no action can be maintained upon it.

Should the gratuitous agent enter upon performance, however, he is bound to properly perform; and for any misfeasance he will be liable in damages to the extent of the injury suffered by the principal.<sup>3</sup>

**§ 159. For failure to obey instructions.** Since the object of an agency is to enable the principal to do through an agent what he himself would do if present, it follows that the foremost duty of the agent is to obey the principal's instructions with utmost strictness, otherwise the will of the principal fails of accomplishment. We have seen that the agent may deviate from his instructions, but so long as he is apparently acting within the scope of his authority the principal is liable to third persons who are affected thereby. But as between the agent and his principal there is a day of reckoning and, subject to exceptions to be noted hereafter, the agent must answer for any deviation from his instructions.<sup>4</sup>

<sup>2</sup> *Wilkinson v. Coverdale*, 1 Esp. 75; *Thorne v. Deas*, 4 Johns. (N. Y.) 84.

<sup>3</sup> *Jenkins v. Bacon*, 111 Mass. 373, 15 Am. Rep. 33; *Williams v. Higgins*, 30 Md. 404; *Lyon v. Tams*, 11 Ark. 189; *Smedes v. Bank*, 20 Johns. (N. Y.) 372; *Short v. Skipworth*, 1 Brock. (U. S.) 103, Fed. Cas. No. 12,809.

<sup>4</sup> *Adams v. Robinson*, 65 Ala. 586; *Frothingham v. Everton*, 12 N.

Example One: The defendant, as agent for the plaintiff, was given by the latter a license for the assignment of a lease to be delivered to the lessee only upon the full payment of arrears in his rent. The lessee tendered a check in payment of the arrears and the defendant accepted it and delivered the license. The check was dishonored, and the plaintiff sued the defendant for the loss. The court held that he could recover.<sup>5</sup>

Example Two: The plaintiff delivered to the defendant a promissory note with instructions to procure a discount thereon, but not to permit the note to go out of his reach without receiving the money. The defendant, after negotiating with one Foote about buying the note, delivered the note to him under the promise that he would get it discounted and return the money to the defendant. Foote took the note away, discounted the note and used the money for his own purposes. The plaintiff sued the defendant for conversion of the note. The court held that the plaintiff could recover.

“The delivery to Foote,” said the court, “was unauthorized and wrongful, because contrary to the express directions of the owner. \* \* \* It was an unlawful interference with the plaintiff’s prop-

H. 239; *Wilson v. Wilson*, 26 Pa. St. 393; *Laverty v. Snethen*, 68 N. Y. 522, 23 Am. Rep. 184, M. 486; *Whitney v. Merchants Union Exp. Co.*, 104 Mass. 152, 6 Am. Rep. 207, M. 484; *Richtscherd v. Accommodation Bank*, 47 Mo. 181; *Fuller v. Ellis*, 39 Vt. 345, 94 Am. Dec. 327.

<sup>5</sup> *Pape v. Westacott*, 1894, 1 Q. B. 272.

erty which resulted in loss, and that interference and disposition constituted, within the general principles referred to, a conversion and the authorities I think sustain this conclusion by a decided weight of adjudication.”<sup>6</sup>

**§ 160. When failure to obey is justified.** There are certain circumstances under which an agent is deemed to be justified in disregarding the instructions of his principal. A sudden emergency may arise in which, to protect the interests of his principal, the agent is obliged to take an entirely different course of action from that outlined for him before the emergency arose. A deviation under such circumstances is justifiable.<sup>7</sup>

For example: Hay, which had been sent to New Orleans during the Civil war, for sale, was seized by the military authorities of the United States. They refused to pay for it except in government certificates of indebtedness, which were worth only 93 per cent of their face value. The agent to whom the hay had been consigned, without communicating with the principal, but according to the custom of factors there, accepted the certificates, and afterward sold them on the principal's account. The court held that the agent was justified.<sup>8</sup>

<sup>6</sup> *Laverty v. Snethen*, 68 N. Y. 522, 23 Am. Rep. 184.

<sup>7</sup> *Forrestier v. Boardman*, 1 Story (U. S.) 43, Fed. Cas. No. 4,945; *Greenleaf v. Moody*, 13 Allen (Mass.) 363; *Bartlett v. Sparkman*, 95 Mo. 136; 8 S. W. 406; *Bernard v. Maury*, 20 Grat. (Va.) 434.

<sup>8</sup> *Greenleaf v. Moody* (supra).

14—Agency

§ 161. **For failure to exercise skill, care and diligence.** Upon undertaking any given agency, an agent comes under a duty to his principal to use such care, skill and diligence as the ordinarily prudent agent would exercise under the circumstances, that is, reasonable care, skill and diligence. A failure to comply with this duty renders the agent liable to his principal in damages.<sup>9</sup> What is reasonable skill, care and diligence depends upon the nature of the service and the attendant circumstances, as well as upon the degree of skill that the agent professes to possess. One who holds himself out as skilled in any particular line of endeavor is held by law to greater accountability than if he had not thus represented himself. But the standard of comparison remains the same—What would the ordinarily prudent man with the skill this man professes to possess do under the circumstances? If measured by this standard the agent is at fault, then the principal has a right of action against him for whatever damage may have resulted from his fault.<sup>10</sup>

For example: The defendant was an attorney at law engaged by the plaintiff to bring suit for \$1,000

<sup>9</sup> *Varnum v. Martin*, 15 Pick (Mass.) 440; *Holmes v. Peck*, 1 R. I. 242; *Heinemann v. Heard*, 50 N. Y. 35; *Wright v. Banking Co.*, 16 Ga. 38; *Steiner v. Clisby*, 103 Ala. 181, 15 South. 612; *Kepler v. Jessup*, 11 Ind. App. 241, 37 N. E. 655; *Lake City Flouring-Mill Co. v. McLean*, 32 Minn. 301, 20 N. W. 233.

<sup>10</sup> *Varnum v. Martin*, 15 Pick (Mass.) 440; *Leighton v. Sargent*, 27 N. H. 460, 59 Am. Dec. 388; *Crooker v. Hutchinson*, 1 Vt. 73; *Holmes v. Peck*, 1 R. I. 242; *Stinson v. Sprague*, 6 Greenl. (Me.) 470.

due the plaintiff from B. The defendant, intending to draw the writ with an *ad damnum* of \$1,200, wrote the word twelve, but negligently failed to write the word hundred. An attachment for \$1,200 was made upon T's property, but this attachment failed by reason of the mistake in drawing the writ. B was at the time of the attachment solvent, but before other action could be taken after the court's adverse decision, B became insolvent and the plaintiff could not collect. He sued the defendant for the loss occasioned thereby. The court held that he could recover, on the ground that the defendant had not exercised ordinary care and diligence.<sup>11</sup>

**§ 162. For failure to exercise good faith.** The appointment of an agent for any purpose is proof that the one who appoints him does so because he has confidence in him. The relation thus established is a fiduciary one, and the agent is required by law to exercise absolute good faith in his relations with his employer. He must serve him with singleness of purpose. He will not be lawfully permitted to act for his principal in a transaction in which he is adversely interested, such as where he has a part interest in property which he purchases of his associates for his principal. The fact that no actual advantage has been taken of the principal does not render the transaction valid, for the law wisely looks to the evil possibilities of such a transaction.

<sup>11</sup> Varnum v. Martin (supra).

The agent's compensation from his principal is the only profit that he is allowed to derive from a transaction in which he acts,<sup>12</sup> unless the principal knows of and assents to the agent's adverse position.

Example One: The plaintiff was employed by the defendant to sell or exchange a certain piece of real estate and through his aid an exchange was effected with C, who had in like manner employed the plaintiff. The plaintiff charged a commission to each, but neither knew of the double employment. Upon finding it out both refused to pay. The court held that the defendant was not liable.

"The law," said the court, "does not allow a man to assume relations so essentially inconsistent and repugnant to each other. The duty of an agent for a vendor is to sell the property at the highest price; of the agent of the purchaser to buy it for the lowest. These duties are so utterly irreconcilable and conflicting that they cannot be performed by the same person without great danger that the rights of one principal will be sacrificed to promote the interests of the other, or that neither of them will enjoy the benefit of a discreet and faithful exercise of the trust reposed in the agent. \* \* \* It is of the essence of his contract that he will use his best skill and judgment to promote the interest of his

<sup>12</sup> Walker v. Osgood, 98 Mass. 348; Hinchley v. Arey, 27 Me. 362; Bunker v. Niles, 30 Me. 431, H. 266; Raisin v. Clark, 14 Md. 158; N. Y., etc., Ins. Co. v. Ins. Co., 20 Barb. (N. Y.) 468; Conkey v. Bond, 36 N. Y. 427, H. 265; Tewkesbury v. Spruance, 75 Ill. 187; Davis v. Hamlin, 108 Ill. 39.

employer. This he cannot do, when he acts for two persons whose interests are essentially adverse.”<sup>13</sup>

Example Two: The defendant while acting as business manager for the plaintiff secretly copied from his employer's order book a list of addresses of customers, and after the termination of the employment he used the list in a similar business of his own. The court held that he was liable in damages to the plaintiff.<sup>14</sup>

**§ 163. — For failure to give notice to principal.** An agent is also liable for failure to notify his principal of any fact that comes to his attention materially affecting the subject matter of the agency. Since he is acting in the principal's stead he is presumably in better position to learn at first hand things that the principal could not learn while absent. If these things are material, the principal ought to know them in order to intelligently direct the agent's activities; hence, it is the agent's duty to notify his principal.

There are cases even where the law imputes to the principal knowledge of any material facts that may have come to the agent's attention, even though through the agent's negligence the principal is in fact utterly ignorant thereof.<sup>15</sup> The law, therefore,

<sup>13</sup> Farnsworth v. Hemmer, 1 Allen (Mass.) 494.

<sup>14</sup> Robb v. Green (1895), 2 Q. B. 1.

<sup>15</sup> The Distilled Spirits, 11 Wall (U. S.) 356; Fairfield Sav. B. v. Chase, 72 Me. 226, 39 Am. Rep. 319; Kearney Bank v. Frohman, 129 Mo. 427, 31 S. W. 769; Trentor v. Pothén, 46 Minn. 298, 49 N. W. 129;

requires the agent to give timely notice of any and all facts coming to his knowledge that would materially affect the principal's interests. Failure to give such notice will subject the agent to liability for whatever damages may result.<sup>16</sup>

For example: The defendant, as agent, was operating a steamboat owned by the plaintiff and others, and, during the time, she was seized by creditors and sold at a gross sacrifice. Defendant did not notify the plaintiff of the seizure. The court held that the defendant was liable in damages, on the ground that it was his imperative duty to give his principal timely notice so that he could have taken measures for his protection.<sup>17</sup>

**§ 164. — Right of principal to an accounting.** In agencies having to do with financial matters the principal has of course a right to demand an accounting of his agent with reasonable frequency. It is accordingly the agent's duty to strive at all times to have the affairs of his agency in such a condition of preparedness that an accounting may be readily accomplished. It is his duty to keep full and accurate records of receipts and expenditures, and to

*Cougar v. Chicago, etc., R. R.*, 24 Wis. 157, 1 Am. Rep. 164; H. 451; *Shafer v. Phoenix Ins. Co.*, 53 Wis. 361.

<sup>16</sup> *Devall v. Burbridge*, 4 Watts & S. (Pa.) 305, M. 499; *Henry v. Allen*, 151 N. Y. 1, 45 N. E. 355, 36 L. R. A. 658; *Enos v. St. Paul, etc., Ins. Co.*, 4 S. Dak. 639, 57 N. W. 919, 46 Am. St. Rep. 796; *American Surety Co. v. Pemly*, 170 U. S. 133, 42 L. Ed. 977.

<sup>17</sup> *Devall v. Burbridge* (supra).

preserve original records, such as vouchers, or other papers that may be of value either to the principal or to himself in establishing the accuracy of his accounts.<sup>18</sup> It is also his duty to refrain from mingling the principal's money or property with his own in such a way that it is not readily distinguishable. If he does so mingle it and a loss occurs he is liable to the principal to the extent of the loss.<sup>19</sup> The agent must, upon demand, deliver to the principal all the latter's property, which is in his possession, and all the proceeds and profits accruing from the agency.

As we have previously seen, the agent has no right to derive any personal profit from the agency, save the compensation allowed him by the principal. If, therefore, he violates this duty and acquires secret profits of any sort the principal has a right to demand them of him, irrespective of whether the principal was injured in the transaction.<sup>20</sup>

For example: The plaintiff gave the defendant \$80 with which to purchase a horse, but with instructions to purchase as cheaply as possible, the defendant to retain one dollar for his services. The defendant purchased a horse of S for \$65 upon an agreement that if he sold the horse for more than

<sup>18</sup> *Gray v. Haig*, 20 Beav. 219; *Haas v. Damon*, 9 Iowa 589; *Kerfoot v. Hyman*, 52 Ill. 512.

<sup>19</sup> *Williams v. Williams*, 55 Wis. 300; *Naltner v. Dolan*, 108 Ind. 500.

<sup>20</sup> *Eldridge v. Walker*, 60 Ill. 230; *Dutton v. Willner*, 52 N. Y. 312; *Bunker v. Miles*, 30 Me. 431, H. 266; *Williams v. Stevens*, L. R. 1 P. C. 352; *Parker v. McKenna*, L. R. 10 Ch. 96.

\$65 he would divide the profits with S. Defendant delivered the horse to the plaintiff, representing that he had saved nothing for himself. He then paid S \$7.50 and kept \$7.50 as his own profit. The plaintiff brought suit to recover \$6.50 from the defendant. The court held that the plaintiff could recover.<sup>21</sup>

<sup>21</sup> Bunker v. Miles, 30 Me. 431, H. 266.

## CHAPTER XVIII

### LIABILITY OF AGENT OR SERVANT TO THIRD PARTIES

- § 165. Authorized contracts.
- § 166. When liability is voluntarily assumed by agent.
- § 167. Personal liability for money paid to him by mistake.
- § 168. Liability for unauthorized contracts.
- § 169. Contracts for fictitious principal.
- § 170. No liability if agency is terminated by death of principal.
- § 171. Liability of agent or servant in tort.
- § 172. Agent liable for misfeasance.
- § 173. No liability for non-feasance.
- § 174.       Meaning of non-feasance.
- § 175. Right of agent against third parties in contract.
- § 176. Right of agent against third parties in tort.

§ 165. **Authorized contracts.** As a general rule, an agent who makes an authorized contract for his principal incurs no personal liability thereon. This is true whether his authority were granted prior to the making of the contract, or whether the principal ratified <sup>1</sup> a contract which the agent had no authority to make at the time of the act. But in order for the agent to escape personal liability he must have made such contract in the name of the principal, so that no misunderstanding as to his agency could

<sup>1</sup> Grant v. Beard, 50 N. H. 129; Brown v. Bradlee, 156 Mass. 28.

exist. We have previously seen<sup>2</sup> that the agent must use "apt words" in order to make clear the capacity in which he acts.

**§ 166. When liability is voluntarily assumed by agent.** Even though the agent acts with full authority from his principal, yet if he neglects to disclose his principal, or where intending so to do he fails to use apt words, he thereby becomes personally liable upon the contract if the third party chooses to hold him upon it.<sup>3</sup> It is true, as we have already seen,<sup>4</sup> that the third party may hold the principal even on a contract where no agency is disclosed, but if the third party prefers to hold the agent personally liable rather than pursue his remedy against the principal, he has an unquestioned right to do so.

**§ 167. Personal liability for money paid to him by mistake.** If, through a mistake, the third party pays to the agent money for his principal, the agent incurs no personal liability by paying it over to the principal unless the third party has notified him of the mistake. If, however, he has received due notification of the mistake he has no legal right to pay it over to his principal, and if he does so he will

<sup>2</sup> §§ 102-104.

<sup>3</sup> *Hobson v. Hassett*, 76 Cal. 203, 9 Am. St. Rep. 193, M. 442; *Tilden v. Barnard*, 43 Mich. 376, 38 Am. Rep. 197; *Knickerbocker v. Wilcox*, 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595.

<sup>4</sup> See § 109.

be personally responsible therefor.<sup>5</sup> Even though he has paid the money over to his principal prior to notification, this will not relieve him from liability if the principal was undisclosed.<sup>6</sup> If the money has been obtained by the agent wrongfully, such as by duress or fraud, he is absolutely liable, even though he were acting under orders from his principal and has paid to him all the proceeds of his wrongdoing.<sup>7</sup>

§ 168. — **Liability for unauthorized contracts.** If a contract is made by an alleged agent who acts without authority from the person for whom he claims to be acting, such a contract is not binding upon the supposed principal. If the agent believes that he has authority when he actually has none, or if having some authority he has not a sufficient authorization to cover the act in question, but nevertheless he enters into a contract with a third person, the law will hold him liable for the resulting damage. It is the agent's duty to know exactly what authority he possesses and, in contemplation of law, he is held to impliedly warrant that he possesses the authority in question. He is, therefore, held liable for breach of "warranty of authority."<sup>8</sup> Of course

<sup>5</sup> Cabot v. Shaw, 148 Mass. 459; La Farge v. Kneeland, 7 Cow. (N. Y.) 456; O'Connor v. Clopton, 60 Miss. 349; Shepard v. Sherin, 43 Minn. 382; Smith v. Binder, 75 Ill. 492.

<sup>6</sup> Smith v. Kelly, 43 Mich. 390.

<sup>7</sup> Ripley v. Gelston, 9 Johns. (N. Y.) 201, 6 Am. Dec. 271; Grover v. Morris, 73 N. Y. 473.

<sup>8</sup> Kroeger v. Pitcairn, 101 Pa. St. 311; Baltzen v. Nicolay, 53 N. Y.

if the agent knows that he has no authority and wilfully misrepresents the facts, he becomes liable in tort for deceit.<sup>9</sup>

§ 169. — **Contract for fictitious principal.** Contracts made by an agent in behalf of a fictitious principal render the agent personally liable. If there is in fact no principal, it is just and proper that the agent should himself be held as the principal. Illustrations of contracts in behalf of fictitious principals are seen in cases of contracts by promoters of a corporation not yet organized,<sup>10</sup> or where one acts in behalf of an unincorporated club or association.<sup>11</sup>

§ 170. — **No liability if agency is terminated by death of principal.** If by reason of the sudden death of the principal the agency is terminated and the agent, unaware of the fact, makes a contract in behalf of his late principal he incurs no personal liability. To be sure there is no principal and no real agency, but the law presumes that any one dealing with an agent assumes the risk of termination of the agency by death of the principal.<sup>12</sup> For the

467; *Weare v. Gove*, 44 N. H. 196; *Seeberger v. McCormick*, 178 Ill. 404; *Trust Co. v. Floyd*, 47 Oh. St. 525.

<sup>9</sup> *Polhill v. Walter*, 3 B. & Ad. 114; *Randall v. Trimen*, 18 C. B. 786; *Noyes v. Loring*, 55 Me. 408.

<sup>10</sup> *Kelner v. Baxter*, L. R. 2 C. P. 174; *Abbott v. Hapgood*, 150 Mass. 248.

<sup>11</sup> *Comfort v. Graham*, 87 Iowa 295, H. 538; *Lewis v. Tilton*, 64 Iowa 220; *Ash v. Gine*, 97 Pa. St. 493; *Blakely v. Bennecke*, 59 Mo. 193.

<sup>12</sup> *Carriger v. Whittington*, 26 Mo. 311; *Farmer's, etc., Co. v. Wilson*, 139 N. Y. 284; *Smout v. Ilbery*, 10 M. & W. 1.

same reason, the party dealing with the agent has no right of action against the dead principal's estate.<sup>13</sup>

**§ 171. Liability of agent or servant in tort.** The law holds every wrongdoer personally liable for his acts. It is no defense, therefore, that an agent has committed a tort at the express or implied command of his principal. He must answer in damages to the injured party. Said an English judge: "The warrant of no man, not even of the king himself can excuse the doing of an illegal act, for although the commanders are trespassers, so are also the persons who did the act."<sup>14</sup>

**§ 172. Agent liable for misfeasance.** It is a universally recognized principle of law that an agent is liable to third parties for misfeasance, that is, for misconduct in the performance of his duties resulting in injury to third parties.<sup>15</sup> Common illustrations of misfeasance are seen in fraud committed by the agent; conversion of the goods of another, either with or without the express authority of his principal; libel committed by the agent; infringement of patents; malicious prosecution; negligence in the performance of an act, etc.

<sup>13</sup> Long v. Thayer, 150 U. S. 520; *Blades v. Free*, 9 B. & C. 167.

<sup>14</sup> *Sands v. Child*, 3 Lev. 352.

<sup>15</sup> *Weber v. Weber*, 47 Mich. 569; *Hamlin v. Abell*, 120 Mo. 188; *Lee v. Mathews*, 10 Ala. 682; *Williams v. Merle*, 11 Wend. (N. Y.) 80; *Bell v. Josselyn*, 3 Gray (Mass.) 309; *Hedden v. Griffin*, 136 Mass. 229; *Allen v. Hartfield*, 76 Ill. 358.

§ 173. **No liability for non-feasance.** An agent or servant is not liable to third parties for mere non-feasance, that is for not performing at all a duty owed to the principal.<sup>16</sup> He is of course liable to his principal, but third persons have no claim against him, however much they may be injured by reason of his neglect.

§ 174. **Meaning of non-feasance.** The distinction between misfeasance and non-feasance is not always easy to determine. If a master orders his servant to repair a breach in a pasture fence and the servant utterly neglects to do so, this is clearly a non-feasance and, if cattle escape and damage a neighbor's crops, the neighbor cannot hold the agent for the injury.

But suppose the servant begins work upon the fence and abandons the work when it is half finished. Is this a non-feasance or a misfeasance? The question is well answered by a Massachusetts judge: "It is often said in the books that an agent is responsible to third persons for misfeasance only and not for non-feasance. And it is doubtless true that if an agent never does anything toward carrying out his contract with his principal, but wholly omits or neglects to do so, the principal is the only person who can maintain any action against him for non-feasance. But if the agent once actually

<sup>16</sup> Weber v. Weber, 47 Mich. 569; Johnson v. Barber, 10 Ill. 425; Phelps v. Wait, 30 N. Y. 78; Mitchell v. Harmony, 13 How. (U. S.) 115; Estes v. Worthington, 30 Fed. 465.

undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not non-feasance, or doing nothing; but it is misfeasance, doing improperly.’’<sup>17</sup>

**§ 175. Right of agent against third parties—In contract.** As a general rule, the agent has no contract rights against third parties; and the reason is perfectly obvious. He is not a party to a properly executed contract, but merely the agency through which the will of the principal acts in the formation of the contract. Not being a party to the contract, he has no rights therein. But this rule has exception, real or fancied, and in some cases an agent has exclusive right to sue upon a contract, and in others he has a concurrent right with his principal. He has an exclusive right to sue if the contract is under seal and he has contracted personally, for at common law no person except a party to the instrument may sue upon a contract under seal.<sup>18</sup> The same

<sup>17</sup> *Osborne v. Morgan*, 130 Mass. 102.

<sup>18</sup> *Shack v. Anthony*, 1 Man. & S. 573; *Violet v. Powell*, 10 B. Mon. (Ky.) 347.

rule applies to negotiable instruments executed by the agent personally.<sup>19</sup> In each case the principal would of course have a right to claim the proceeds of the suit.

In ordinary contracts that have been executed in such a way as to bind the agent, his right to sue is merely concurrent and not exclusive. The principal, even though undisclosed, has a right to intervene and if he asserts that right the agent has no right of action. The principal may of course permit the agent to sue in his behalf,<sup>20</sup> but his own right is always paramount to that of the agent, unless the agent has an interest in the subject matter.<sup>21</sup>

**§ 176. Right of agent or servant against third parties—In tort.** The third party will be liable to the agent for injury to, or conversion of, goods of the principal in which the agent has a special property.<sup>22</sup> He will also be liable to the agent in damages for inducing the principal to dismiss him from employment.<sup>23</sup>

<sup>19</sup> *Grist v. Backhouse*, 20 N. C. 496; *U. S. Bank v. Lyman*, 20 Vt. 666, Fed. Cas. No. 924; *Fuller v. Hooper*, 3 Gray (Mass.) 341.

<sup>20</sup> *U. S. Tel. Co. v. Gildersleeve*, 29 Md. 232; *Gardner v. Davis*, 2 C. & P. 49; *Ludwig v. Gillespie*, 105 N. Y. 653; *Albany & Co. v. Lundberg*, 121 U. S. 451.

<sup>21</sup> *Rowe v. Rand*, 111 Ind. 206, M. 257; *Rhodes v. Blackston*, 106 Mass. 334, 8 Am. Rep. 332, M. 584; *Thompson v. Kelley*, 101 Mass. 291, 3 Am. Rep. 353, M. 653.

<sup>22</sup> *Moore v. Robinson*, 2 B. & A. 817; *Robinson v. Webb*, 11 Bush (Ky.) 464; *Donahue v. McDonald*, 92 Ky. 123; *Fitzhugh v. Winan*, 9 N. Y. 559; *Little v. Fossett*, 34 Me. 545.

<sup>23</sup> *Chipley v. Atkinson*, 23 Fla. 206; *Curren v. Golen*, 152 N. Y. 33; *Plant v. Woods*, 176 Mass. 492.

## CHAPTER XIX

### TERMINATION OF AGENCY

§ 177. By terms of the agreement.

§ 178. By mutual agreement.

§ 179. Revocation by principal.

§ 180. Irrevocable—When agency is coupled with an interest.

§ 181. When agency is coupled with obligations.

§ 182. Notice of revocation.

§ 183. Renunciation by agent.

§ 184. Termination by operation of law.

**§ 177. Termination of agency by terms of the agreement.** If the terms of the agreement specify that the agency shall continue for a definite time, as for one year or one month, the expiration of the stipulated time will put an end to the contract without the necessity of action by either party.<sup>1</sup> If the agency was created for the accomplishment of a certain purpose, or until the happening of a certain event, the accomplishment of the purpose or the happening of the event will terminate the relation.<sup>2</sup>

**§ 178. Termination by mutual agreement.** Any contract irrespective of its terms may be annulled by the mutual agreement of the parties thereto.

<sup>1</sup> Gundlach v. Fisher, 59 Ill. 172.

<sup>2</sup> Short v. Millard, 68 Ill. 292; Moore v. Stone, 40 Iowa 259; Ahern v. Baker, 34 Minn. 98, H. 171.

The contract of agency may therefore be terminated by the mutual consent of the principal and agent. It matters not what their previous agreement may have been, or for what period of continuance the agency may have been created it is always capable of termination by mutual consent.

**§ 179. Revocation by principal.** By the general rule a principal may revoke his agent's authority at any time, with or without cause,<sup>3</sup> although in the latter event the agent has a right of action for breach of contract.<sup>4</sup> There are however two generally recognized exceptions to the rule: (1) If the agent's authority is coupled with an interest the principal cannot revoke it. (2) If the agent's duties involve the assumption of obligations the principal cannot revoke.

**§ 180. — Irrevocable where authority is coupled with an interest.** The term interest in this connection does not mean a mere interest in the successful outcome of the agency, for every agency should involve that. It means rather such an interest in the subject matter of the agency that a revocation of

<sup>3</sup> Hartley's Appeal, 53 Pa. St. 212; Blackstone v. Buttermore, 53 Pa. St. 266, H. 191, W. 983; Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, H. 195, W. 974; Chambers v. Seay, 73 Ala. 372, H. 192; Clark v. Marsiglia, 1 Denio. 317, 43 Am. Dec. 670; State v. Walker, 88 Mo. 279; Owen v. Frank, 24 Cal. 171.

<sup>4</sup> McGregor v. Gardner, 14 Iowa 326.

the agency would work a *loss*, or a *hardship* upon the agent.<sup>5</sup>

Example One: A conveyed by deed certain real estate to B as security for a debt, and the instrument contained a power of sale. A died, and B was about to sell the real estate when A's administrator applied for an injunction to prevent the sale. The court held that the agency was not revoked by A's death, since it was a power coupled with an interest.<sup>6</sup>

Example Two: A appointed M his agent to dispose of certain personal property and to apply the proceeds to the payment of notes on which M was an endorser. A died before the property had been disposed of. The court held that M's agency was coupled with an interest, and was not revoked by the death of the principal.<sup>7</sup>

**§ 181. Irrevocable when agency is coupled with obligations.** If, in the due performance of his duty, the agent has become personally involved in financial obligations to third parties, the agency is irrevocable. So also if the revocation and the resulting termination of the agent's negotiations with third parties would expose him to a suit for damages, the agency is irrevocable.<sup>8</sup>

<sup>5</sup> Hunt v. Rousmanier (supra); Roland v. Coleman, 76 Ga. 652, H. 203; Knapp v. Alvord, 10 Paige (N. Y.) 205, R. 776, W. 979; American L. & T. Co. v. Billings, 58 Minn. 187; Muth v. Goddard, 28 Mont. 237.

<sup>6</sup> Roland v. Coleman (supra).

<sup>7</sup> Knapp v. Alvord (supra).

<sup>8</sup> Hess v. Ran, 95 N. Y. 359, H. 205; Goodwin v. Bowden, 54 Me.

For example: R was indebted to plaintiff. R had in the hands of the defendant funds more than sufficient to pay his debt. He ordered the defendant to settle plaintiff's claim and the defendant promised the plaintiff that he would do so. Before he had paid the plaintiff the defendant revoked the order. The court held upon suit being brought that the agency was irrevocable because of defendant's liability on the said promise.<sup>9</sup>

**§ 182. Notice of revocation.** The law imposes upon a principal who has revoked the authority of an agent, the duty to give actual notice to all who have dealt with him through the agent, and a public notice to others.<sup>10</sup> If the principal fails to give such notice a person who deals with the agent supposing him still to possess the authority he assumes, will be protected and can hold the principal to the same degree of liability as though the agency had never been revoked.

**§ 183. Renunciation of agency by agent.** If the terms of the agreement provide that the agency may be terminated at the will of either party upon due notice of the intention, the agent may of course exercise his right to terminate the agency without

424, H. 206; *Kindig v. March*, 15 Ind. 248, H. 207, W. 983; *Crowfoot v. Gurney*, 9 Bing. 372.

<sup>9</sup> *Goodwin v. Bowden* (supra).

<sup>10</sup> *Maxey Mfg. Co. v. Burnham*, 89 Me. 538, 86 Atl. 1003, 56 Am. St. Rep. 436; *Clafin v. Lenheim*, 66 N. Y. 301, M. 294; *Wheeler v. McGuire*, 86 Ala. 398, M. 362.

becoming liable in damages. He may also lawfully renounce the agency because of the principal's fault, such as requiring him to perform dishonest or illegal acts. But if the agent renounces his agency in violation of the terms of the agreement, he thereby becomes liable to his principal to the extent of the damages incurred.

**§ 184. Termination by operation of law.** The relation of agency will terminate by operation of law upon the death of the principal, unless the agency is coupled with an interest,<sup>11</sup> and this is true even though neither the agent nor the party with whom he deals is aware of the principal's death.<sup>12</sup> Insanity or bankruptcy of the principal will also terminate the agency.<sup>13</sup> The destruction of the subject matter would ordinarily terminate the agency. The breaking out of war between two nations suspends all contractual rights between citizens of the belligerent nations, hence if a principal is a citizen of one such nation and the agent is a citizen of the other the relation of agency will be suspended until peace is declared.<sup>14</sup>

<sup>11</sup> *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174, M. 322; *Knapp v. Alvord*, 10 Paige 205, 40 Am. Dec. 241, M. 328; *Farmers' Loan & Trust Co. v. Wilson*, 139 N. Y. 284; *Gardner v. First Nat. B.*, 10 Mont. 149, 10 L. R. A. 45.

<sup>12</sup> *Weber v. Bridgman*, 113 N. Y. 600, M. 331.

<sup>13</sup> *Matthiessen Co. v. McMahon*, 38 N. J. L. 536, M. 335; *Drew v. Nunn*, 4 Q. B. D. 661.

<sup>14</sup> *Insurance Co. v. Davis*, 95 U. S. 425, M. 336; *Williams v. Paine*, 169 U. S. 55; *Sands v. Ins. Co.*, 50 N. Y. 626, 10 Am. Rep. 535.



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